

Law Periodicals
Juridical



UNIVERSITY OF LONDON
LIBRARY

JURIDICAL REVIEW

Digitized by the Internet Archive
in 2026

JURIDICAL REVIEW

VOLUME LXVII—1955

Edinburgh

W. GREEN & SON, LIMITED

LAW PUBLISHERS

[All rights reserved]

PRINTED IN GREAT BRITAIN
BY
THE EASTERN PRESS LTD.
LONDON AND READING

JURIDICAL REVIEW

THE ANATOMY AND PATHOLOGY OF THE CONSTITUTION ¹

FIRST I must, not from custom, but from obligation, pay tribute to my predecessor, Professor Saunders, whose tenure of this chair was all too short, but, in the time he had, he added distinction to it. I never knew him save by repute. In that he stood high. He was a man of whom his contemporaries could say that he bore a vast stock of learning lightly, and who earned respect equally from my generation, even from those who did not readily accord it to their elders; to him they gave it not only as a scholar, but as a man of quiet charm and kindness of spirit. He will, too, be long remembered by his students as a teacher, always ready to help and who made learning an easy task: as a scholar, and teacher, his name will endure both in his own country and in America.

Next I must turn to my other purpose. An inaugural lecture is inevitably something of an ordeal, and the fact that the adjective is apt does not help. It merely means that the lecture comes at a time when a hammer or screw-driver is as often in the lecturer's hand as his pen. For the lawyer there are particular difficulties. He lacks the ready texts of his brethren of divinity and classics. He cannot as can his brethren of the physical sciences hold forth on the wonderful things to come, nor even, like those of the social and moral sciences, seek to show how those wonderful things may be used to achieve an earthly paradise rather than Armageddon. He must deal with a subject which in general repute shares the characteristics of Coleridge's frightful fiend and the Delphic Mysteries; yet a subject

¹ Being the text of an inaugural lecture delivered in the University of Edinburgh on October 13, 1954.

with many branches of which members of his audience are familiar. Thus beset he must nevertheless steer between technicality and platitude.

On this occasion a theme was suggested by the cumulation of the titles of the three chairs to which appointments were announced at the same time, for it is with the structure and ills of the constitution that any course on constitutional law must be concerned. The cumulation of stipends could be equally felicitous, but that is beyond my powers. I must content myself with certain aspects of those studies which seem important today, and to be of concern to lawyers.

It is, however, in this branch of law that non-lawyers are perhaps most at home. Clearly the constitution moulds and reflects national character and is so much a part of ordinary life that its main principles and institutions are obvious to all. A chance issue of the day's paper evoked directly or indirectly memories of *Sommersett's case*² or *Knight v. Wedderburn*,³ according to its jurisdiction of origin. Equally in its literature the subject is not a lawyer's peculiar. Latterly much has been written by those who are not lawyers by trade, but statesmen or politicians, as you will, whose long experience in working the constitution entitles their views to respect.⁴ For, just as indirectly does the whole community by its habits and actions mould the constitution, so more directly is it moulded by Ministers and administrators. The degree to which the boards of nationalised industries are answerable to Parliament is not finally settled by the Acts setting up these boards, but by the activity or restraint of individual Members of Parliament,⁵ by the inclination of individual Ministers, by the working of the Clerks at the Table, and above all it will be settled by the way in which the proposed Select Committee

² (1772) 20 St.Tr. 1.

³ (1778) Mor. 14545. Other matters dealt with at length, and which could fall under this head, included the place and purpose of private bill legislation and the legal and financial position of the New Town Corporations. See *The Times* or *The Scotsman* of August 2, 1954.

⁴ e.g., The Rt. Hon. L. S. Amery, *Thoughts on the Constitution*, or The Rt. Hon. H. Morrison, *Government and Parliament*.

⁵ Morrison, *op. cit.*, 260-261.

on Nationalised Industries ⁶ sets about its task. So too does the constitutional position of civil servants depend upon the actions of Ministers in Parliament rather than on any rules of law.⁷

These are but current and relatively trivial illustrations of the consequences of our form of constitution, but they emphasise that constitutional law is not solely the concern of lawyers. Indeed while all law may be regarded as the handmaid of other arts and sciences that is particularly true of constitutional law. It is not the function of the constitutional lawyer to originate policies, but rather to provide the means whereby the ideas of others may be carried out and fitted into existing ways and institutions. Some thirty years ago Sir William Holdsworth gave little scope to the constitutional lawyer. "In our own times," he said,⁸ "the influence of lawyers is less direct. Their work consists partly in the maintenance of tried and tested constitutional principles against the criticisms of visionary, and often imperfectly educated, political theorists, and partly in giving practical shape to projects of reform by supplying a ballast of common sense and a spirit of compromise which is not afraid to be illogical"—a saying which might have been regarded as controversial in that college whence I come, particularly if you remember its full title. If then the constitutional lawyer is not an originator and has no exclusive right to pronounce on the constitution, it may well be asked what is the function of constitutional law in the universities and especially in the curriculum of law students? That question is particularly pertinent if it be remembered that cases of constitutional significance arise but rarely in practice.

To that question there are I think a number of sound answers. The first and most general is provided by the

⁶ See *Report from the Select Committee on Nationalised Industries*, July, 1953 (H.C. 235) and the statement in the House of Commons on July 13, 1954 (*Hansard*, Vol. 530, col. 280).

⁷ See the Debate on July 20, 1954, and particularly the speech of Sir Maxwell Fyfe (*Hansard*, Vol. 530, col. 1284). The value of strong ministerial support is commented on by Prof. K. C. Wheare, *The Civil Service in the Constitution*, 29-30.

⁸ The Creighton Lecture 1924, reprinted in *Essays in Law and History*, at p. 72.

nature of our constitution. Just as with the Homeric or any other great national saga, traditional legends are handed on for the edification of new generations, so with us in the absence of any self-contained constitutional document it is right that each generation of lawyers should be made familiar with the achievements of their predecessors and with the courage and spirit of those whose place they inherit. It is as well that the part played by ordinary lawyers should be emphasised. The courage of Lord President Seton in *Bruce v. Hamilton*,⁹ the collective courage of the judges in *Cavendish's* case,¹⁰ or the brusque answers of Coke have their rightful place, though sometimes these heroes were not heroic. But there must also be remembered the ordinary practitioners who had sufficient respect for principle to take risks in its defence. That respect will only be acquired through a familiarity with our institutions and their development which will show that fundamental liberties, as we know them, are not in the order of nature, and do not perpetuate themselves without effort on our part. The battles of Lord President Seton were repeated in the Claim of Right, those of *Cavendish's* case in the *Case of Prohibitions*,¹¹ and even in recent months *The Times* has had to resume articles, though of somewhat muted tone, of the sort which once earned it the title of the Thunderer,¹² and the late Lord Asquith had to say that public policy in law "is not the same thing as the policy of the government whatever its complexion."¹³

That respect is all the more important because of the rarity of constitutional cases. When they arise they must be recognised for what they are, and that is not always easy. The sums involved are often small.¹⁴ It is not always the

⁹ See the article "Kings *versus* the Court of Session" by Lord Cooper, *The Juridical Review* (1946), Vol. LVIII, 83.

¹⁰ (1587) 1 And. 152.

¹¹ (1607) 12 Co.Rep. 63.

¹² e.g., "The Battle of Barnet—New Style," August 5, 1954, or "The Rights of Cypriots," August 10, 1954.

¹³ *Monkland v. Jack Barclay Ltd.* [1951] 2 K.B. 252, 265.

¹⁴ In *Sammut v. Strickland* [1938] A.C. 678 it was 2s. 9d., in *Bowles v. Bank of England* [1913] 1 Ch. 57 effectively something under a pound. It is true that

most endearing characters who are involved. For every Hampden or Melville there will be found a Wilkes. If such cases are to be fought lawyers must be found sufficiently imbued with principle to undertake them, and if Holdsworth's purpose is to be achieved studies of structure of the constitution must lead back to principles. The anatomy with which the student is concerned is an anatomy of principle.

Thus even on Holdsworth's basis there is good reason for pursuing constitutional studies. That justification is however as important for ordinary citizens and for those who are to enter the public service¹⁵ as it is for the law student. For the latter there are special reasons. There is a tendency for the law student to be too much a lawyer, too logical, and too narrow, for there is a mathematical fascination in bandying cases, in the pursuit of which the interests of the client are lost sight of. It was of this that Baron Hume spoke when he warned them against "too great fondness for speculative notions" or "the debauchery of metaphysical speculation"¹⁶ and when he emphasised that "The law, under which this or any other nation lives, was not constructed by metaphysicians. It is the assemblage of those customs and regulations which mankind, according to the state of society they are in, feel to be just or find to be convenient."¹⁷ It is because of familiarity with the actual working of the constitution that the student can most readily perceive through its analysis the limits of law itself, the limits of logic in its development, and the need for law to be fitted to the current requirements of society. He will constantly be reminded in the words of Holmes J. that "Constitutions are intended to preserve practical and substantial rights, not to maintain theories."¹⁸ He will learn

neither Mr. Bowles, nor, earlier, Mr. Bradlaugh, would willingly have abandoned litigation but men of their ardour are not common.

¹⁵ See letter of Sir E. Bridges addressed to the Civil Service quoted in *The Times*, September 7, 1954.

¹⁶ *Lectures*, p. 6 (Stair Society Edition).

¹⁷ *Op. cit.*, p. 6.

¹⁸ *Davis v. Mills* (1904) 194 U.S. 451, 457.

that there is room for ambiguity, so that things may work themselves out,¹⁹ even for an Act which says in one section that certain territory is not part of Her Majesty's Dominions, and in a following one that nevertheless such territory is not a foreign country—legislation of course which deals with Ireland.²⁰ It might also be added that there are peculiar advantages in both teaching and learning in a capital city, for teachers no less than students are prone to those "speculative notions," and the close contact which is there possible with those who actually work the constitution is a necessary and welcome corrective.²¹

This practical element is perhaps worth further emphasis. We have spoken of the legendary character of the constitution and of familiarity with the past but the lawyer must remember another warning by Holmes: "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws on the present."²²

For just as there is, reputedly, a tendency for soldiers to start each war by fighting the battles of the last, so, most certainly, there is a tendency for lawyers to continue to fight battles that have long since been concluded, or were perhaps merely part of a mock war. If we speak of the steps by which the power of Parliament, freedom of speech, and the like, were won so as to keep memories fresh we have in one sense done enough. In another we have not. Were the constitutional combatants of the past alive today they would neither continue the same wars they used to wage nor would they stop fighting.

¹⁹ Thus in Dicey and Rait, *Thoughts on the Scottish Union*, at p. 192, it is suggested that the ambiguity in Art. XIX of the Treaty of Union was intentional. So too a Money Bill under the Parliament Act, 1911, finally resolves itself into what the Speaker for the time being says is one.

²⁰ The Ireland Act, 1949, ss. 1 and 2.

²¹ Compare the plea for an understanding of the Parliamentary Draftsmen's task by Sir Granville Ram (1951) J.S.P.T.L., at p. 457.

²² *Collected Papers*, "The Path of the Law," at p. 195. Compare Maitland's remark "What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better,"—"Why the History of English Law is not written," *Collected Papers* I, 491, and that of Professor Plucknett "Once the professor of law embarks upon history he has become a historian, for legal history is not law, but history," 67 L.Q.R. 190.

Effectively the power of the State is no doubt greater now than ever before. That is inevitable. Not merely has the complexity of society grown so that greater regulation cannot be avoided, but the scientists have made it possible for us to regulate in ways, and in areas, effectively closed to our ancestors. Not merely have communications improved, but advances in statistical methods, economic speculation, and the like extend the possibility and the temptation to control.²³ Much of this control we bring upon ourselves. Though we may profess objections to it we desire the things which make control inevitable. If the country desires a National Health Service it must put up with a considerable administrative organisation which will rub shoulders with individuals, and even tread on their toes. Of one aspect of this development it has been said "If our people prefer to live the carefree life of a South Sea Islander happy in his lack of wants they can enjoy the benefit of low rates. But if, as seems to be the case, they prefer to live their crowded anxiety-ridden lives in the neon-lighted chromium plated cities of western civilisation, they must be prepared to pay for it in, among other evils, high rates."²⁴ High rates are one product, the growth of opportunities for maladministration or for heedless or unthinking infractions of personal liberty is another. The problems of individual liberty are as important today as they were in the seventeenth century, but they are of a different order. Increasingly they are concerned with property and livelihood.²⁵ For we have not made government perfect by making it theoretically responsible. Indeed once government is in the hands of responsible Ministers rather than an autocratic king there is some tendency for its claims to

²³ See Sir Oliver Franks, "Central Planning and Control in War and Peace," Lect. I and III, discussing the application in peace of knowledge of techniques forcibly acquired in war. Sir Edward Bridges in "Treasury Control," The Halldane Memorial Lecture 1952, emphasises the same point.

²⁴ Address by Lord Greenhill to the Institute of Municipal Treasurers and Accountants, "Do Rates Matter?"

²⁵ e.g., *Nakkuda Ali v. M.F. de S. Jayaratne* [1951] A.C. 66; *Barnard v. Dock Labour Board* [1953] 2 Q.B. 18; *Lee v. Showmen's Guild* [1952] 2 Q.B. 239; and *Bonsor v. Musicians Union* [1954] Ch. 479, are further illustrations.

absolutism to be greater, since it is assumed that the safety valve of responsibility will prevent unhappy consequences. It may well do so in major cases, but it is doubtful if it is sufficiently effective in all. Because of pressure on its time there are limits to the ability of Parliament to redress individual grievances.²⁶ The operation of the courts, and therefore of lawyers, remains of cardinal importance. But the lawyer can play his part best if he fights the right battles. It is useless to cry out against the existence of delegated legislation or administrative adjudication. That battle is lost, if indeed it was ever worth fighting at all. What he must concern himself with is the limits and methods of their regulation. Certainly he cannot stand by and content himself with the maintenance of "tried and tested principles" unless those principles are to be understood in a much wider sense than I suspect Holdsworth intended. He must concern himself with the expansion of the application of old principles in the broadest sense, and with the development of new methods in law for their defence.

Indeed all reasons so far given for the study of constitutional law are secondary compared to this. Perhaps the real answer to our question, and to Holdsworth, was given a few years later by General Smuts saying "In many if not in most European countries the standard of human freedom has already fallen far below that of the nineteenth century. Perhaps I do not exaggerate when I say that of what we call liberty in its full meaning, freedom of thought, speech, action and self-expression, there is today less than there has been during the last two thousand years."²⁷ Yet Smuts spoke at the beginning of that chain of events which led to the revolutionary changes between 1939-46. While Holdsworth would urge us to study the anatomy of the

²⁶ As to the influence of this theoretical responsibility see Cassels J. in *Healey v. Min. of Health* [1954] 2 All E.R. 580 or *Pollock School v. Glasgow T.C.*, 1946 S.C. 373. Indeed Disraeli went so far as to say—speaking of the great constitutional combatants—"But all their heroic labours will prove worse than fruitless if the divine right of kings is to be succeeded by the divine right of the House of Commons," *A Vindication of the English Constitution*.

²⁷ In his Rectorial Address to the University of St. Andrews, October 17, 1934.

constitution so that its principles are clearly observed, Smuts would urge us to move on and concentrate on its pathology.

A warning should however be given. In one sense it is a mistake to speak of a crisis in regard to old principles, and to cry that the constitution is in danger. That cry has been raised in the past on occasions varying from any of the Reform Acts, through the National Insurance Act of 1911²⁸ to the first Contagious Diseases Acts.²⁹ The truth is that it is of the nature of our constitution to live in danger. The pre-1832 constitution was in mortal danger, and died. Nor would we want to resurrect it. What has to be ensured is that in changing constitutional forms the effective operation of old principles is preserved and fresh applications are made. Thus there seems, despite protests, no great cause for alarm in the disappearance of a great deal of the freedom of Members of Parliament in the House itself. It may well be immaterial, or even have advantages, if, as appears to be the case, equally effective means are found for the private Member to make his views felt.³⁰

How then is the constitutional lawyer to deal with the problems arising from the present cycle of change. In the first place he must constantly avoid being content with appearances, and seek reality. There traditional studies may help. We have already spoken of the legendary character of the constitution, and the adjective is apt. For his studies will show him that things were often not in fact what they were reputed to be. One of the traditional ways of advancement used by both the Scottish and English Parliaments was to claim as undoubted and long-established rights, privileges which they tentatively hoped to enjoy in the future, and at times the claim is now read as fact. So too Dicey has shown that the effective right of freedom of

²⁸ Dicey, *Law and Opinion in England*, Introduction to the 2nd edition.

²⁹ *The Constitution Violated*, by Josephine E. Butler, Edinburgh, 1871, a booklet referring to the Contagious Diseases Acts of 1866, 1868 and 1869.

³⁰ The recent debates on the issues of judicial salaries, payments to M.P.s and television show this power. The advantages are to be found in the stability of governments.

speech is a more recent creation than legend would have us believe.³¹ An awareness of the existence of past legends may put the student on his guard for present ones—for certain branches of constitutional law are like the English mortgage, little but a living lie. It is important that we should analyse our institutions carefully in order to ascertain the purposes they were intended to serve, the extent to which they do so in fact, and their relationship with principle. The formal description of the Privy Council or of the Board of Trade scarcely corresponds with reality, but little harm is done,³² and it is probably good that the office of Lord President of the Council should have become available for a government odd-job man. But in other cases it is necessary to go behind the appearances and find what the institution is and does if dangers are to be avoided. Such studies as that of the *Place of Parliament in the Legislative Process*,³³ though they may sound frivolous, are in fact essential. It is equally necessary that the real nature and character of local authorities should be examined if we are to be satisfied that current legislation is not in fact radically altering their character or, if it is, whether the alteration is for the good.

For, unless the nature and purpose of institutions are examined it may well be that they will get wrongly treated in law. Thus we find it asserted, as a result of the *Stevenson* case,³⁴ that the law relating to Ministerial Inquiries has been radically altered. This seems true only if we neglect the fact that the phrase "Local Inquiry" has become a modern commonplace description of institutions essentially different. The purpose of the inquiry there was limited.³⁵ It was designed for the information of the Minister and so that those affected should know that their views had been

³¹ *Law and Opinion in England*, Lect. VI.

³² Thus, when asked whether the curious nominal composition of the Board of Trade should not be amended, Mr. Thorneycroft replied (*Hansard*, Vol. 510, col. 1999), "I have found that it works very well with a quorum of one and I should not like to disturb the arrangement."

³³ J. A. G. Griffith, 14 M.L.R. 279, 425.

³⁴ *Franklin v. Min. of Town and Country Planning* [1948] A.C. 87.

³⁵ *Per* Lord Thankerton [1948] A.C. at 106.

ventilated. It was as the then Attorney-General said an opportunity for "letting off steam" or as Queen Victoria more formally said, "a means of giving confidence that Her Majesty's Government is not actuated by rapacity."³⁶ Such informative inquiries are radically different from the appellate forms which appear under the Housing Acts or under the Town and Country Planning Acts and it will be a misfortune if the chance similarity of name unduly limits the utility of one form, or is allowed to weaken the safeguards which have been developed for the other, for it is as important to preserve ministerial responsibility in the first case as to ensure the pursuit of proper aims in the other.³⁷ In the same way it will be a misfortune if the word "licence" acquires a purely administrative significance.³⁸

These examples emphasise that it is only by examining the purpose of any institution that its proper treatment in law will be achieved. Equally the real value of an institution only becomes apparent by observing its operation. We are concerned about the mass of delegated legislation. But we may be told all is well, there is a Statutory Instruments Act which provides for publication; and does not parent legislation normally provide for laying Instruments before Parliament? Doubtless these provisions are good but publication does not in practice convey certain knowledge to interested parties, and is in itself no protection against the making of Instruments likely to cause hardship. As to

³⁶ *Letters, First Series*, at p. 502. A letter to Sir C. Wood in connection with the annexation of Indian provinces—in that case Buhassir.

³⁷ That there is some weakening of general principle appears from *Nakkuda Ali* (*supra*). The importance of preserving Ministerial responsibility was emphasised by the comments on the *Report of the Consultative Council on Local Health Administration*, 1922 (Cmd. 1113), which had proposed arrangements infringing the concept of Ministerial responsibility. The distinctions between various types of inquiry are however emphasised in *Magistrates of Ayr v. Lord Advocate*, 1950 S.C. 102, 1950 S.L.T. 257.

³⁸ See *Nakkuda Ali* (*supra*) and cases like *R. v. Metropolitan Commissioner of Police, ex p. Parker* [1953] 1 W.L.R. 1150, in England. This concept of a licence as purely administrative neglects the analogy of other forms, e.g., of liquor licensing, or the licensing of slaughterhouses, where strong protections are given to the holder, e.g., compensation for revocation. It is perhaps attributable to the more widespread use of the word in the operation of war-time controls.

laying, such a provision was in the Fire Services (Emergency Provisions) Act, 1941, and was inserted because of Ministerial concern for individuals. Yet the same Minister had later to seek an indemnity Act because the orders were not laid. That was a case of honest error, of abundant good faith, yet it was never discovered by anyone save those who made the slip.³⁹ The Psalmist's maxim "Put not your trust in princes" might well today be transcribed, "Put not your trust in forms of words."

This distrust of words is of importance since there is sometimes a tendency, especially at times such as these, to rely on a well turned but ambiguous phrase. Such phrases may give an illusion of safety, without them the obvious insecurity of a principle may stimulate its defence. If, in seeking to "promote the general welfare and ensure the blessings of liberty" you decree "nor shall any property be taken without due process of law" you may have achieved little beyond a fine phrase and a fortune for lawyers. Moreover such formulations may be misleading by their very breadth.⁴⁰ If you decree that "the obligation of contracts shall not be impaired" or that "no private property shall be taken for public use without just compensation," you may create a false sense of security, since there will be found a vast range of interferences with contracts or property which are neither "impairment" nor "taking" as those words have been interpreted, though by the light of nature they might be thought to be so. No doubt at times such phrases can have value to individuals. Recently they benefited a road haulier in Northern Ireland,⁴¹ but as a general rule a study of our constitutional development shows that present dangers are better met by the

³⁹ For an account see Morrison: *op. cit.*, p. 322. Since this lecture was delivered a more surprising example has arisen under the Wireless Telegraphy Act, 1904.

⁴⁰ See, e.g., as to the difficulties of ascertaining whether or not there has been an infraction of guarantees, *Govindan Sellappah Kodakan Pillai v. Bunchi Banda Mudanayake* [1953] A.C. 514. Similarly the recent "segregation case," *Bolling v. Sharpe* (1954) 347 U.S. 497, shows that the absence of formal guarantees may not materially diminish the protection of the individual.

⁴¹ *Ulster Transport Authority v. James Brown and Sons Ltd.* [1953] N.I. 79. It seems doubtful if by U.S. standards there was in fact a taking in that case.

development of institutions and habits of mind than by formal pronouncements. There is probably greater protection for the individual in the Select Committee on Statutory Instruments than in the relevant rules of law.⁴²

That digression emphasises that we should analyse the words we use in much the same way as our institutions. Phrases like the rule of law can indeed become more "incantations than ideas" and here too there is a need to "rid our minds of cant," as Lord Cooper has recently put it.⁴³ Wide claims to privileges are advanced on the ground of prerogative or because service is Crown service, words which suggest a strong personal link with the Sovereign and tend to create obstacles to the examination in the courts of government activities. It seems possible that the use of such phrases may obscure our view of what really is involved, and appearances may again be deceptive.⁴⁴ While here it is maintained that Crown service necessarily involves an unfettered right of dismissal, it is to be observed in the White Paper dealing with the Oversea Civil Service⁴⁵ that strict and enforceable conditions of service are regarded as essential. One wonders why the home gander should be treated differently from the overseas goose, and it seems possible that the use of the word "prerogative" and the like have obscured the consideration of the proper justification for, and limits of, special rules governing public service, and caused unnecessary differences in the treatment of its various parts.

That governments require special privileges cannot be

⁴² There are many other illustrations. Thus the present satisfactory position of the Comptroller and Auditor General inclines to this process, rather than to the legislation establishing the office. See his evidence before the *Select Committee on Nationalised Industries*, 1953 (H.C. 235).

⁴³ *Public Administration*, Vol. XXXII, at p. 167. The former phrase is Lord Radcliffe's in his Reith Lectures, *The Problem of Power*. The familiarity to which reference has been made is often an obstacle to this process of analysis.

⁴⁴ Compare Denman C.J. speaking of Parliamentary Privilege, "The old textbook writers, indeed, affirm the law and custom of parliament, although a part of the *lex terrae*, to be *ab omnibus quaesita, a multis ignorata*. This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense." *Stockdale v. Hansard* (1837) 9 A. & E. 1, 113.

⁴⁵ *Reorganisation of the Colonial Service* (H.M.S.O. 1954, Col. 306).

denied. Thus it was, that after the American Revolution many of the so-called Royal Prerogatives were taken over automatically by the states, both as to internal⁴⁶ and external affairs.⁴⁷ These examples suggest that many of the so-called prerogatives should be examined in a severely practical light rather than as a survival of older ideas of kingship. If so looked at, their proper scope can be more readily perceived. Indeed it may be that in the organisation of the central government the inter-relation of prerogative and statute requires much closer examination. The distinction made between the two sources of power both in the Crown Suits (Scotland) Act, 1857, and in the Ministers of the Crown (Transfer of Functions) Act, 1946, is one that may have influence when questions of governmental privileges are under discussion.⁴⁸ That governments, if they are to perform their functions properly, must enjoy special privileges cannot be denied. But claims to privilege can outrun justification and proper limits will be found only by an examination of both purposes and origins.⁴⁹

Here again this University is admirably situated for the purpose. The claims of governmental privileges are not identical north and south of the Tweed,⁵⁰ though there is perhaps some tendency when legislation is contemplated to

⁴⁶ *McCulloch v. Maryland* (1819) 4 Wheat. 316, the right to charter corporations.

⁴⁷ See e.g., *U.S. v. Curtiss Wright Export Corp.* (1936) 299 U.S. 304.

⁴⁸ Thus while it is recognised that statutory powers may exclude prerogative ones, *Att.-Gen. v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, and full effect is given to this in smaller things, as in *Re Mitchell (dec'd.)* [1954] Ch. 525 (as to the nature of the Crown's right of succession), this distinction between statutory and prerogative functions is not always drawn. It was however in *Theodore v. Duncan* [1919] A.C. 696, 706.

⁴⁹ Thus it appears absurd that the privileges of the Crown should result in individual financial benefit, as was the case in *Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] A.C. 584.

⁵⁰ Compare the attitude of Lord Robertson in *Mackay and Esslemont v. Lord Advocate*, 1937 S.C. 860 at p. 865, 1937 S.L.T. 577, asserting that tenure *ad vitam aut culpam* was a common law characteristic of a judicial appointment, with that of Lord Goddard C.J. in *Terrell v. S. of S. for Colonies* [1953] 3 W.L.R. 331. The Scottish courts too have shown a stronger continuing readiness to examine claims to privilege regarding the production of documents despite *Duncan v. Cammell Laird Ltd.* [1942] A.C. 624, see, e.g., *M'Rae v. M'Rae*, 1947 S.C. 173, 1947 S.L.T. 19, or *M'Kie v. Western S.M.T. Co.*, 1952 S.C. 206, 1952 S.L.T. 191.

choose the larger as the universal.⁵¹ It is because of the differences between the two systems that it is easiest to examine the validity of claims that certain privileges are essential.

Indeed, it is in examining purposes that comparative law can play its greatest part and supplement the processes of analysis. Here, as in other branches of learning, time and space are but alternative methods of measurement. The institutions and rules of 500 years ago or less have no greater relevance to our modern institutions than those which are 5,000 miles away. The happenings in Canberra, Ottawa, or, for that matter, Tennessee, may be more important to us than those at the beginning of the nineteenth century. In Canberra we can watch the development of forms of Cabinet selection which might have had superficial attraction, but having watched can reject.⁵² We can also watch, and perhaps use, experiments in Cabinet devolution.⁵³ In Ottawa we can watch the development of an international undertaking in the St. Lawrence, or, in Tennessee, the development of the legal relations of one of the greatest public corporations.

I do not for a moment suggest that institutions of others can be imported, though even that, as Lord Haldane showed, can sometimes be done, but comparative studies can serve two major purposes. You can watch the practical development of lines of thought and see if they are fruitful. If they are not, you save time in experiment. If they are, you can take and mould the idea to native conditions. For if constitutions are to keep pace with a rapidly developing society experiments in constitutional machinery must be made. Yet there is a limit to domestic experiment. At some time, as I have recently been reminded, the furniture must come

⁵¹ Thus in the Crown Proceedings Act, 1947, the possibility of obtaining an interdict against the Crown went, injunctions not having run in England save in rare cases.

⁵² See Rt. Hon. C. R. Attlee, *As it Happened*, at p. 156, on the rejection of the method of Cabinet selection by a party caucus.

⁵³ See *The Times* of July 15 and 17, 1954, discussing the Committee system of the Australian Cabinet.

to rest, even if it is not quite right. It is then all the more important that we should profit if we can by the experiments of others.

Secondly you can see more clearly what you are trying to do with your institutions. When Australians argue whether the Crown is one or several,⁵⁴ whether the Crown in title of the Commonwealth can bind the Crown in title of the State of Victoria, or what is the relationship of either to the Crown in title of the United Kingdom there is something for us in the arguments. Such questions may be relevant here, not only in our relationships with Northern Ireland, but also, more generally, since our ideas of what we mean by the Crown will be clarified, and principles governing the relationship of various parts of government to each other may become apparent.⁵⁵

Just as it has been seen that the arguments in the *Stevenage* case only re-echo those between Queen Victoria and her Governor-General of India, so also there is continuity in space. Our problems are not purely local, and a study of the experience of others may help us to see them and their solutions more readily.

Yet care must be taken; outside the Commonwealth such study is not always easy, superficial resemblances may conceal fundamental differences, and the attractiveness of the novel and strange must not be allowed to impair native virtues. Thus it must be remembered that we have always aimed at practical efficiency not neatness, and above all we have been prepared to take risks. We have not attempted the formulation, and special protection, of fundamental liberties and the same spirit has been reflected in our whole administration. Risks could be taken because while there was a willingness to confer broad powers there was also the confident expectation that if those powers were misused or

⁵⁴ Most recently in *Commonwealth v. Bogle* (1953) 26 A.L.J. 589. The cases there discussed show the long history and conflicting decisions on this controversy.

⁵⁵ Thus at the same time that we were indemnifying Mr. Niall Macpherson, M.P., who had taken office under an Australian public board, in South Africa it was asserted with confidence that in an analogous situation no such action was necessary, *The Scotsman*, August 18, 1954.

abused then heads would roll. True they now roll in a modified way. We do not impeach, we simply expel to the political wilderness. I emphasise this principle for three reasons, first, that it is not a universal one, but is typical of those domestic virtues to which I have referred, and secondly because it is one which an analysis of our own recent experiments shows may easily be impaired. Its proper application requires that responsibility must be clearly fixed, and there are signs that we could easily drift into a situation where the interplay of Ministry, nationalised industry, and local authority, is such that responsibility for action or inaction cannot clearly be laid at anyone's door. Twice in recent weeks this danger, and the value of this principle, have been emphasised. Once, in the Crichel Down Enquiry⁵⁶ and once in connection with the same Ministry by the Select Committee on Estimates,⁵⁷ a coincidence which demonstrates that here as elsewhere sound constitutional and sound administrative practice march hand in hand.⁵⁸ The cause of some present ills may be found to lie in the neglect of a principle which our anatomical studies might have disclosed.

There is a third reason for emphasising this principle. The protection of the individual inevitably involves the control of the administration, but it must not be forgotten that government must be carried on, and be carried on with energy. Nor should our civil servants be chained as if they were wild dogs. It would indeed be unfilial of me to suggest that. Not merely must our institutions be analysed so that the appropriate degree of control can be imposed, but also it seems important that the methods of control

⁵⁶ Cmd. 9176. See also Cmd. 9220, the Report of the Committee to consider whether certain civil servants should be transferred to other duties.

⁵⁷ Sixth Report 1954 (H.C. 233). Equally Sir Edward Bridges in the Stamp Memorial Lecture 1952, *Treasury Control*, emphasises the same principle in the relationship of the Treasury to other Departments.

⁵⁸ In the same way much of the criticism of the Stevenage and similar inquiries could be overcome by a greater willingness to show the Ministerial case. That course would also make the inquiry more efficient from the point of view of the Ministry by disclosing further considerations and facts. Compare the remarks of Sir Colin Campbell in his Report on the Gatwick Inquiry, Cmd. 9215.

should be examined in the light of this principle. The methods of interdict, declaration, or prerogative order, may be both too drastic and too ineffectual. Too drastic because they involve such a degree of judicial intervention in the administrative process that they will only be resorted to in extreme cases. Too ineffectual because annulment of an order is often inadequate protection for the individual who may by it have been injured in his livelihood.⁵⁹ These methods of control should, perhaps, be supplemented by a power to award compensation somewhat in the same way as the Chancery Division was, in 1858,⁶⁰ given the power to award damages in lieu of injunction.

This concern with new methods leads to my final question. Analysis of principles and institutions can lead to a true understanding of them, and of the causes of present dangers. But the lawyer must move on from anatomy and pathology to cures. It is proper for him to ask whether our law at present adequately protects private rights, and if not to suggest remedies. Changes in the forms of governmental activities mean that public bodies are brought into much closer and more varied contact with individuals. Thus it is asserted in England, and demonstrated in Scotland,⁶¹ that the existence of the National Health Service has altered the legal relationship of hospitals and their staffs. In these circumstances it is proper to ask whether we are right in rejecting specific rules of public law governing the relationship of individuals to public authorities.

One particular problem can emphasise this. Increasingly there is a tendency to ask the man from the Ministry what the position is. Does this work need a licence? Does that want planning permission? Ought I to pay contributions at this rate, or that? The practice finds official

⁵⁹ Compare the difficulties in the way of the award of damages in England in *Bonsor v. Musicians' Union* [1954] Ch. 479 and see note 25, *supra*.

⁶⁰ The Chancery Amendment Act.

⁶¹ *Hayward v. Board of Management of Royal Infirmary of Edinburgh and Others*, 1954 S.L.T. 226, and see Prof. Hamson, "The Liability of Hospitals for Negligence" in *Law in Action* and Sir Alfred Denning, *The Changing Law*.

encouragement in the explanatory note to Statutory Instruments.⁶²

It is a practice which is harmless if the advice given is right, but if it is wrong, can the citizen be penalised for the illegality which he has unwittingly committed? The answer given by the House of Lords is that the advice must be neglected and the true law must take effect.⁶³ This is a hard answer but one dictated by the need to maintain fundamental principles. Unless that answer is given the position of the courts as the arbiters of law is gravely prejudiced. Nevertheless it is an answer which can cause great hardship. A merchant agrees to buy surplus steel from the Collector of Customs, and after he has agreed to resell is told that the steel, though it was not known at the time, was in fact Admiralty property and as such the Collector had no authority to deal with it. The contract is *ultra vires* and therefore no remedy can be given founded upon it.⁶⁴ The representation of authority which did not exist in law cannot be made binding as we have just seen. There can be no remedy against the Collector himself, because there is supposedly a rule that a servant of the Crown cannot be held liable for breach of warranty of authority.⁶⁵ There can be no remedy against the Collector's superior founded upon a "holding out" under ordinary principles of agency because the principal is the Crown and each servant of the Crown is in direct relationship with it and is not the servant or agent of his official superior.⁶⁶ The Crown is a corporation sole⁶⁷

⁶² Though compare the conventional warning in the Ministry of Housing and Local Government pamphlet on the Local Government Superannuation (Benefits) Regs., 1954, that opinions expressed should not be regarded "as authoritative pronouncements by the Minister."

⁶³ *Howell v. Falmouth Boat Construction Co., Ltd.* [1951] A.C. 837.

⁶⁴ *Att.-Gen. for Ceylon v. A. D. Silva* [1953] 2 W.L.R. 1185. The same principle is involved in *Mackay and Esslemont v. Lord Advocate*, 1937 S.C. 860, 1937 S.L.T. 577, in the proposition that the letters of appointment there were illegal.

⁶⁵ *Dunn v. MacDonald* [1897] 1 Q.B. 555, an English case, the supposed result of which is accepted as applicable to Scotland: see Gloag on *Contract*, 2nd ed., 160; Fraser, *Constitutional Law*, 2nd ed., 171.

⁶⁶ *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178.

⁶⁷ Whether the Crown is such in Scotland has been doubted: see Prof. D. M. Walker, "The Legal Theory of the State" (1953) *Juridical Review*, Vol. LXV,

and as such only capable of acting through servants and incapable of any holding out itself. All this, which results in the denial of any remedy, has the beauty of logic and the ugliness of injustice.

The situation could be met in a variety of ways. We could challenge the rule that a Crown servant is not liable for breach of warranty of authority.⁶⁸ That course would probably result in the government standing behind the individual servant and justice might be done. It is however a course of action which is uncertain and inconvenient, and revives many of the difficulties which we have only just got rid of by the Crown Proceedings Act.⁶⁹ It might be possible to avoid the inconvenience of the Crown as a corporation and to say that a servant who is sufficiently high in the hierarchy can be identified with the Crown and so be capable of holding out.⁷⁰ Similar steps have been taken in other fields. But, it is a course which the courts are reluctant to take, and, even if taken, only leads back to the original difficulty. Just as the inferior servant cannot give himself power when in law he has none, neither can the superior servant nor even the Crown itself. It was for the subjection of the Crown to law that our ancestors fought in the courts, and in the field.

The arguments are not exhausted, though my audience may be. The limitation of power may not be absolute, but conditional. Here it could be said that, applying the ordinary rules of agency, if the facts on which authority depended were purely within the knowledge of the public body then that body should be held bound, even though it had in truth exceeded its authority. The analogy is however false. In the case of public bodies a much stronger public policy requires that limits imposed by the legislature

255. Yet the doctrine seems to be accepted in *Bell, Pr.*, § 2176, who seems to recognise at least the institution, if not the name. Even if the doctrine is rejected this difficulty is not removed.

⁶⁸ See Street, *Governmental Liability*, p. 93.

⁶⁹ In particular those involved in *Adams v. Naylor* [1946] A.C. 543.

⁷⁰ Compare the position in *The Admiralty v. The Owners of S.S. Divina* [1952] P. 1 at 20-21.

should be maintained. Again it could be said that many of these limitations could be treated as directory only, and not mandatory. That is however a very uncertain distinction.⁷¹ Finally there are difficulties of determining whether the representations involved in these cases are of law or fact.

I have pursued this labyrinthine course not to weary you, but to show that when we deal with public authorities analogies from private law do not produce justice. Governments cannot be treated as larger and more interfering Lever Bros. or I.C.I. They are different in purpose, different in kind, and should often be subject to different rules of law. Thus here it is possible that relief could be found through monetary compensation regarding the acts of the official as a "*faute de service*"⁷² for which the administration is liable to compensate. The force of the legal limitations can be maintained by denying the validity of the contract; and conceivably the effectiveness of those limitations could be reinforced by the application of administrative sanctions akin to the powers of surcharge in regard to local authorities, which are capable of great pliability. In that way can public policy be enforced without injury to the individual, but any such solution involves considerable departure from the rules of private law, and a considerable extension of theories of compensation. But here, as in the case of judicial control of administrative decisions, it may be that by some such way a flexible and adequate means of control could be found.

Indeed a general study of the scope of compensation for consequences of government action seems likely to be profitable. It is a question that arises in a variety of ways. The present discussions of compensation for subsidence and for compulsory acquisition are further illustrations. It may be that we are too ready to expect uncompensated sacrifices by individuals for the good of the community, especially if those individuals are not ourselves. Admittedly there is

⁷¹ See Griffith and Street, *Principles of Administrative Law*, 106-7.

⁷² This phrase should not be taken as implying that there is such responsibility in France.

also a present danger that we may be led into an unreasonable expectation that every calamity that overtakes us in life should be paid for by someone else, but even when allowance is made for that there seems a good case for examining, both as to rights and remedies, the rules of law which govern the relationship of the State and the individual outside the traditional fields of civil liberties.

It is because the harmonious regulation of that relationship has always been the province of constitutional law that such an examination is not out of place in this field. In seeking the proper protection of the individual here we are doing in other fields what our ancestors did in their establishment of basic freedoms. Clearly however in these other fields a close acquaintance with the rules of private law is also necessary. Of the lawyer, and the law student, can more therefore be expected than of his lay brethren; and unless a course of constitutional law can engender in some students at least an enduring interest in such problems it has failed in its purpose. For the relationship between man and the State was not finally settled in 1688 nor in 1832; it was not fixed for all time by the Claim of Right, or the Bill of Rights. Nor have the relationships of part and whole in the machinery of government necessarily assumed their final shape. The lawyer has as much to contribute today as ever he had in the days of our ancestors.

I have roamed far and wide in an attempt to show the sort of problems which seem to me to face the constitutional lawyer in universities. I have asked more questions than I have answered. But, if an Episcopal metaphor may be risked so close to St. Giles', that is the privilege of the curate in his first sermon. It is for the Bishop, or perhaps on this occasion for the Dean, to content himself with pronouncing *Nunc Dimittis*.

J. D. B. MITCHELL.

STAIR THE SCIENTIST?

WE are all acquainted with Stair the lawyer and Stair the judge. A few may even admit Stair the theologian. But how many will accept the claim implicit in the title to this article?

It was in 1686, when he had already been for some years an exile in Holland, that Stair published in Leyden his *Physiologia Nova Experimentalis*. At any time and in any hands the project of this work as unfolded on its title-page would have been ambitious enough, for the author's declared purpose was to expose and correct the errors of Aristotle, Epicurus and Descartes. Had it appeared twenty years earlier it is just possible that the book might have been remembered even yet. But, as luck would have it, a less propitious moment for its publication could hardly have been chosen. It was in April of the same year that the manuscript of Newton's *Principia* was brought by Halley to the notice of the Royal Society of London, and from that moment scholastic natural philosophy passed from the realm of science into the pages of history. Stair's *Physiologia* was thus still-born. He had lit a taper only to see it overwhelmed in the blaze of the rising sun.

The book is a stout quarto of 632 pages, written in Latin and illustrated by diagrams. The subject-matter is the work of natural science. Under each head the treatment is both descriptive and speculative; but the descriptive matter is valuable but not original, and the speculations are original but not valuable.

Of the descriptive portion of the work it can be said that it contains a summary of all the main scientific discoveries which had then come to light, and that it is written with a clarity which proves the author's mastery of the data which he had laboriously assembled from a multitude of sources. A large section is devoted to Dynamics, with the

theory of the lever, the pulley and the pendulum fully explained. Another deals with the foundations of Hydrostatics and Pneumatics, and contains a close study of the barometer and the phenomena of atmospheric pressure. The central portion is given to Astronomy, and (as one would expect) it is brought right down to date by references to the transit of Mercury in 1677, the occultation of Jupiter in 1679, and the comets of 1681 and 1682. The depth of reading undertaken by the author in the production of the work is shown by the many references to such recondite sources as the *Transactions* of the Royal Society.

For anyone who is not a professional scientist to cover so wide a technical field was in those days no mean achievement. But in all this Stair was treading where other feet had trod; and when he passes from Physics to Metaphysics and seeks to rationalise the material in twelve postulates and nine propositions, his adequacy for his self-imposed task becomes more questionable. Even in the descriptive parts of the book Stair's attitude is strictly objective; and if he had any knowledge of the new mathematical technique of Kepler and Descartes, his work betrays no evidence of the fact. It is thus not surprising that though Stair dedicated the book to the Royal Society, they never acknowledged the compliment by electing him to a fellowship.

To us the main interest of the book is not in what it tells us about Natural Philosophy but in what it tells us about Stair. It is plain enough from what we know of Stair's engrossing preoccupations during his active career that the *Physiologia* must have been the fruit of studies first systematically pursued after he fled to Holland. He may have immersed himself in these studies in order to employ his enforced idleness and to stifle his disappointments. He may even have had before his eyes the example of Bacon. But it is impossible to read the book without recognising in it a labour of love,—a revival probably of interests first aroused in the old days at Glasgow University, and the

belated realisation of a cherished ambition, the wish of a man of active mind to shine in some sphere far removed from that in which his normal lot is cast.

Retrospective wisdom may smile at a system of mechanics without the laws of motion ; or a chemistry built upon oil, sulphur and specific spirits ; or a cosmology which rejected Copernicus in favour of Ptolemy. But the fact remains that the composition by Stair at such an age and under such conditions of a book of this type is one more proof of the versatility and intellectual reach of the founder of modern Scots law who, schooled by circumstances to spend his working life on the prose translation of law and politics, saw and seized the chance of one bold incursion into the poetry of science. Stair's monument is his *Institutions*. His *Physiologia* may find a place beside Raphael's sonnets and Dante's pictures.

COOPER OF CULROSS.

THE UNIVERSITIES AND SCOTTISH LEGAL EDUCATION

EVEN a superficial survey of the meagre literature regarding legal education¹ in Scotland reveals at once its characteristically critical nature. Hardly a writer but deplores the unsatisfactory state of legal studies or the inadequate preparation for professional practice afforded by the existing system, or the decay in legal scholarship. This is the more regrettable in a country where law and the universities have had a long and intimate connection² and where education itself has always been held in the highest regard.³ Indeed the casual observer might be pardoned for overlooking this national characteristic so little impression has it made upon our legal studies, unless perhaps for the fact that in Scotland the universities take a more important (and up till now an increasingly more important) part in such studies than in many another country.⁴ Nor is the complaint of recent origin. As far back as 1867 (a few years after the first General Ordinances had established

¹ This article deals mainly with education for the solicitor branch of the profession. F. W. Maitland in *Collected Papers*, Vol. III, p. 419, gives the reason why education for the Bar is not such a pressing problem.

² More so than in the common law countries. "European law schools grew inside the universities while American law schools grew outside the universities": 1947 *Public Admin. Review*, Vol. VII, p. 213.

³ "In the northern parts of our own island," wrote Blackstone in the Introduction to his *Commentaries* in 1765, "where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education who is destitute of a competent knowledge in that science which is the guardian of his natural rights, and the rule of his civil conduct." It is not so today, but not only in Scotland. Professor L. C. B. Gower has written of "the astonishing paucity of published material on the topic" in England; and "all is far from well with English legal education and training": 1950 *Modern Law Review*, Vol. XIII, p. 203.

⁴ Although one critic felt in *Juridical Review*, 1940, Vol. LVIII, p. 26, that the academic approach was more marked before 1707 and that Scotland now follows England at a distance. But the universities at which this academic education was received were for the most part Dutch or French. So in the reign of Charles I it was thought "strange to see ane man admitted to teach the lawer who was never out of the countrie studieing and learning the lawes": Spalding's *History of the Troubles*, Vol. I, p. 179.

systematic education for law degrees in Scotland, but when the output of graduate lawyers was negligible) Lord Moncreiff was complaining that the time for study was short and the ground so extensive that results were poor.⁵ The following year Professor Lorimer, Scotland's most notable scholar and writer on the subject,⁶ in his Inaugural Lecture at Edinburgh University, deplores the absence in Scotland of a philosophy of law, and ruefully wishes that Edinburgh might some day vie with Heidelberg as a great law school.⁷ In 1895, some twenty-two years after the control of professional examinations had been placed in the somewhat disinterested hands of the Court of Session, Lord Chief Justice Russell offers a remark which though referring to England might equally have served to sum up the whole history of legal education in Scotland: results are good, he says "in spite of" the system.⁸ Instances could be multiplied but two comments of more recent date may serve to show that the critical tradition persists. In 1928 Lord Cooper of Culross wrote a noteworthy paper posing the question why the legal profession in matters of education fails to reach the high standard of the medical profession.⁹ Equally unfavourable comparisons have been drawn between the legal and other professions.¹⁰ He would be a brave man who would share the optimism of an American professor who wrote fifty years ago that "there is no reason why Edinburgh should

⁵ *The Education of a Lawyer*, 1867.

⁶ Lorimer's advanced views on law and its study are exemplified by his assertion that the proper function of a law faculty is to deal with the whole man. "As a social being, he is ours and ours alone": *Law Magazine and Quarterly Review of British Jurisprudence*, 1863, Vol. XVI, p. 314.

⁷ "Reasons for the Study of Jurisprudence as a Science": Inaugural Lecture, 1868. A similar sentiment is expressed in an article in *Journal of Jurisprudence*, Vol. II, p. 105. Edinburgh was then held up as an example of what a law school ought to be by Lord Selborne in *Law Magazine*, 1873, Vol. III, p. 744.

⁸ 3 S.L.T.(News) 129; a familiar expression in the writings on the subject. See also Blackstone's *Commentaries*, Introduction: "Some in spite of this method of education" have shone at the Bar; *Law Review*, 1855, Vol. XXII, p. 317; Sidney Post Simpson in *Harvard Law Review*, 1945, Vol. LIX, p. 694, says: "Many good lawyers develop in spite of the present system"; and Samuel Warren, *Introduction to Law Studies*: "Thousands have succeeded despite this lack of professional education."

⁹ T. M. Cooper, 1928 S.L.T.(News) 57.

¹⁰ For example: *The Relationship of the Legal Profession to Accountancy*, 1922, Donald Mackay.

not become as great a school of law as of medicine.”¹¹ The purpose of this article is to review and assess briefly the apparent inadequacy of university education for the legal profession in Scotland, and to suggest that the present day marks a cross-roads in matters affecting legal education in this country. In the process we may gather much of the source material available to us today.

To condense its history, legal education in Scotland begins with the Church. Practically all lawyers were clerics. The Notary Public, appointed by Papal authority from the thirteenth century onwards was the ancestor of the procurator and the solicitor.¹² A series of Scots Acts beginning with that of 1503, c. 64, provided for their admission and examination.¹³ The existing Register of Notaries opens on February 28, 1563, and by an Act of that year the Lords of Council had their examination. The fifth Parliament of James IV passed an Act requiring law to be taught in all grammar schools but this was law for the gentry rather than law for the professional man. The term solicitor first appears towards the end of the sixteenth century.¹⁴ They grew up around the local judicatories learning their trade by apprenticeship,¹⁵ which was not, however, made compulsory until 1825. There was no organised curriculum until the Procurators Act of 1865, which gave the General Council powers in legal education.¹⁶ But in 1873 the Law Agents Act placed the control of solicitors in the hands of the court and legal education was stereotyped for the next 60 years. The

¹¹ N. J. D. Kennedy, *Juridical Review*, 1905, Vol. XVII, p. 246. A similar sentiment has long been prevalent, see "Legal Education and the Scottish Universities": *Journal of Jurisprudence*, Vol. XXIV, p. 626.

¹² "Notes on the History of the Solicitor Profession in Scotland," J. S. Muirhead, *Scottish Law Review*, Vol. XLVIII, p. 25.

¹³ By 1469, c. 30, the King also affirmed his right to appoint notaries.

¹⁴ The first English attorneys date from a statute of 1285.

¹⁵ There were a number of private teachers of law in the eighteenth century. *Scottish University Studies*, Alex. Morgan, p. 102; Lorimer, *Journal of Jurisprudence*, Vol. XXXII, p. 229; *Memoirs of Lord Kames*, 1870: A. Fraser-Tytler, Vol. I, p. 13. Bayne's *Lectures*, 1707, and Wm. Scott's *Compendium* were apparently for use in connection with private classes, and also Ross's *Styles*, 1792, which were designed to supplement what might be learned in apprenticeship and for use in private teaching.

¹⁶ Something of the early education for the Bar may be gathered from George Chalmers' *Life of Thomas Ruddiman* 1794.

Solicitors (Scotland) Act of 1933 returned control to the General Council under that Act and finally the Legal Aid and Solicitors (Scotland) Act, 1949, transferred it to the Law Society with whom it now rests.¹⁷

Alongside the growth of the skeleton profession, and by no means independent of it, the universities included from the earliest times provision for the study of the civil law.¹⁸ For political and ecclesiastical reasons, however, Scotland looked principally to the universities of the Continent,¹⁹ especially to Bologna, Paris, Leyden and Utrecht²⁰ for the education of her civilists and the Scottish chairs languished. In 1558 Robert Reid, Bishop of Orkney,²¹ bequeathed a large sum of money for the founding of a national school of law, but due to the disturbances of the Reformation his testamentary wishes were partly frustrated and the money was otherwise employed.²² After the union of the Crowns the universities began to give more attention to their native laws and a chair of Scots law was founded in Edinburgh, not without some trouble, in 1722. The other universities followed suit but the early professors did not always command authority. They were "only echoes of Dutchmen."²³ By the time of the first Universities Commission of 1830 the

¹⁷ For most of this paragraph see J. S. Muirhead, *loc. cit.*

¹⁸ The Papal Bull of Benedict XIII provided for a doctor of civil law at St. Andrews in 1413, but the civilists of that college have long been silent: *Journal of Jurisprudence*, Vol. X, p. 281. *University of St. Andrews*, R. G. Cant, p. 4. For 300 years there was virtually no law teaching at St. Andrews until 1899 when lectures in Scots law began at Dundee where in 1939 a complete B.L. course was provided: Cant, p. 134. Glasgow had a faculty of canon law in the fifteenth century and at the beginning of the eighteenth century the teaching of civil law and medicine was there "revived": *University of Glasgow, 1461-1951*, J. D. Mackie. The Edinburgh Chair dates from 1710.

¹⁹ Hence there was no need for a national school of law.

²⁰ "Leyden in the eighteenth century could rightly be called one of the British universities," N. Hans, *New Trends in Education in the Eighteenth Century. The Scottish Legal Tradition*, T. M. Cooper (1949), p. 9.

²¹ Bishop Reid had evidently a concern for law. He was a member of the Provincial Council of the Church which decreed at Linlithgow in 1549 that every cathedral church should have its professor of canon law: *History of Education in Scotland*, 1893, John Edgar, p. 226.

²² *History of Edinburgh*, Hugo Arnot, 1816; *Charters, etc., of the Town Council and Senatus of Edinburgh University, 1583-1858*, ed. Alex. Morgan. "It was not till 1582 that a signature was passed for the Charter under which the college took shape": *History of University of Edinburgh, 1883-1933*, ed. A. Logan Turner.

²³ *Social Life of Scotland in the Eighteenth Century*, H. G. Graham.

pattern of legal education—civil law in the first year, Scots in the second, and later conveyancing in the third—had been established.²⁴ But the only degrees conferred by the Scottish universities were honorary.²⁵ The Commissioners appointed under the Universities (Scotland) Act of 1858, which marked the beginning of the modern conception of a university, determined to remedy the situation and established by General Ordinance 75 the course of study for a degree of LL.B. “as a mark of academical and not of professional distinction.”²⁶ These “very enlightened provisions”²⁷ as Professor Lorimer called them, marked the commencement of a high tradition which the universities hoped would be “instrumental in elevating the standard of legal education in the country.”²⁸ The Royal Commission of 1876 appeared to be satisfied²⁹ with the provisions for legal education so far as they affected the profession, but the Commissioners under the Act of 1889 attempted to broaden the degree course for the benefit of those who did not intend to follow law as a profession. “Not without some hesitation” they also confirmed the practice which had grown up of conferring a lower degree of B.L.³⁰ particularly designed for this class of students. For half a century only minor adjustments were made in the scheme of university instruction in law. Those will be referred to in the pages which follow. So much for the skeleton.

At the outset it might be well to consider the question whether law is indeed a subject which can be imparted through the medium of a university. It would explain the captiousness of the critics if in fact our teachers had been labouring to teach the unteachable. The component subjects of the law course should no doubt be considered separately.

²⁴ *Report*, p. 63.

²⁵ *General Report*.

²⁶ *General Report*, 1863, p. xxxvi.

²⁷ *Law Magazine*, 1863, Vol. XVI, p. 313.

²⁸ *General Report*, p. xxxvi.

²⁹ *Report*, p. 36.

³⁰ *General Report*, issued 1900.

Certain of them, such as accounting and conveyancing,³¹ are sometimes considered borderline cases. But as for the historical, analytical and comparative disciplines most writers are in agreement that academic treatment is both feasible and desirable. Dicey himself, a now somewhat discredited oracle, considered this question with regard to English law.³² Were the opinion sought of a body of practical barristers, their unanimous verdict would be, he thought, that English law could not be taught but only learned. Such would no doubt be the opinion of those whose education was entirely obtained at their own hand by reading in chambers.³³ To-day, however, when reading in chambers would in Scotland at any rate be regarded only as a supplement to and not a substitute for systematic instruction in law, the practical barrister's opinion would probably be different.³⁴ Dicey went on to show however that, whatever the popular prejudices, "to recognise the shortcomings and still more the advantages of reading in chambers is almost the same thing as determining how far law can be taught at the universities." At university, he suggests, in words the spirit of which has been matched in the writings of many lawyers, law can be surveyed as a whole,³⁵ and the habit of analysing and defining legal conceptions instilled: there can be nurtured the habit of digesting the mass of the law into

³¹ W. T. S. Stallybrass, 1948, *Journal of Society of Public Teachers of Law*, p. 164.

³² "Can English Law be taught at the University?" A. V. Dicey, Inaugural Lecture at All Souls College, 1883.

³³ "The most remarkable thing about it," wrote Walter Bagehot, "is that it is not reading at all": 1870, *Fortnightly Review*, p. 689.

³⁴ At any rate the Faculty of Advocates decided that they should demand of entrants evidence of general and legal learning. "The proper evidence of general scholarship" they pronounced to be "a university degree": Report of Committee, July 11, 1854. The following year another Committee of Faculty recorded their belief that the primary object of university instruction in law was to treat the study as a science: Report of Committee, June 8, 1855.

³⁵ Blackstone, *Commentaries*, Preface, advised that the student "should consider his course as a general map of the law." Lord Kames, *Historical Tracts*, Preface, urged him by an historical approach to his studies "to climb up to the vantage ground." Austin, *On the Study of Jurisprudence*, 1834, counselled him to approach that subject "with the map of a body of law distinctly impressed on his mind." It is the broad overall perspective which is required. So Denning L.J. stresses that the universities are concerned with the law as it was, as it is, and as it ought to be: 1949 *Journal of Society of Public Teachers of Law*, Vol. I, p. 258.

rules and exceptions, and there can be aided, stimulated and guided the reform (in Scotland we might almost say the creation³⁶) of contemporary legal literature. In other words English law of which he was particularly writing is capable of academic treatment.³⁷ The universities with their atmosphere of detached study over the whole field of knowledge where one subject may cross-fertilise the study of another are best fitted to undertake that treatment.³⁸ Indeed it has been said that the problem of university education in law is one of "building bridges to the other departments of the university"³⁹ to take full advantage of this cross-fertilisation. If this is true of the common law of England⁴⁰ which "has less of principle and more of detail"⁴¹ than any other national jurisprudence,⁴² it is surely at least equally true of Scots law.

It hardly requires a Dicey, however, to establish this. Though its function is much more than a technical school the university must teach particular subjects.⁴³ Law which presents such a rich field for scientific classification and philosophical commentary is surely well adapted to the academic

³⁶ Scots lawyers would do well to consider afresh the suggestion made a century ago for the formation of a society for promoting the improvement of law literature: *Law Review*, 1848, Vol. VIII, p. 265.

³⁷ A. L. Goodhart agrees: 1950 *Journal of Society of Public Teachers of Law*, Vol. I, p. 333: "With the possible exception of philosophy there is none which can excel it." And C. J. Hamson in Vol. II, p. 19: "It is difficult to conceive a subject in itself more suitable for academic study than the law of England."

³⁸ One of the criticisms of the Inns of Court was that they had but one faculty: so with any purely law school: "Outline of Legal Education," G. R. Y. Radcliffe in 1937 *Year Book of Education*.

³⁹ 49 *Harvard Law Review*, 1936: "The place best adapted for the preliminary or philosophical study of law is without a doubt the university," wrote Seymour F. Harris in *Law Magazine*, 1875, Vol. I, p. 522.

⁴⁰ According to Lord Hale's Preface to Rolle's *Abridgement* the common law of England is more particular, more numerous, less methodical and takes longer to study than other laws: *Collectanea Juridica*, Vol. I, p. 263.

⁴¹ Blackstone justified the academic study of law on the Aristotelian ground that "jurisprudence or the knowledge of the laws is the principal or most perfect branch of ethics": *Introd. Commentaries*, 1765.

⁴² Sir Wm. Hamilton: *Discussions on Philosophy*, p. 337.

⁴³ "The Idea of a University," Newman, *Discourse 7*. This is not to say that law alone is the end of university training. A student who has pursued a university education should have "a faculty of entering with comparative ease into any subject of thought, and of taking up with aptitude any science or profession": Preface to 1873 ed., p. xviii.

method. It is not caprice but hard learning that makes a good lawyer.⁴⁴ In fact, in Scotland the academic treatment of law is well established.⁴⁵ The trouble which the profession faces today is that legal theory both in this country and in England has remained the exclusive province of the academic lawyer. The problem is to bridge the gulf⁴⁶ between the harassed practitioner and the armchair jurist who, as Lord Cooper says in a recent book review, "do not speak the same language."⁴⁷ Doubtless in Lord Moncreiff's high-sounding phrase "law is the study of a lifetime . . . it is to be studied as a science, but to be practised as an art."⁴⁸ Yet somehow we have failed to produce lawyers great enough to supply the "missing link"⁴⁹ which ought to bind the practitioner and the scholar⁵⁰: to create the expansive lawyer of all-round achievement.⁵¹ Yet the search has been going on since at least the days of Professor Lorimer.⁴⁹ Can the failure point to the inadequacy or the ill-balance of our system of legal education, perhaps even to

⁴⁴ The cynic's view: "There be three roads to success in law: pleading, sessions, and miracle": *Law Review*, 1844, Vol. I, p. 153.

⁴⁵ Those who laid the foundations of the study of law in our universities began "not in practice but in theory": *Journal of Jurisprudence*, Vol. X, p. 281. The first Scottish law degree was intended to be "a mark of academical and not of professional distinction": Report of Univ. Commission, 1858.

⁴⁶ Lorimer used a similar phrase in "Legal Education in a University," *Journal of Jurisprudence*, Vol. XXVIII, p. 598, where he suggests the remedy to be the academic study of jurisprudence. Gower refers to the gap between academic and practical teachers in England as "unbridged": 1950 *Modern Law Review*, Vol. XIII, p. 203.

⁴⁷ Review of *Justice* by del Vecchio in *Univ. of Edin. Journal*, Vol. XVI, p. 115.

⁴⁸ *The Education of a Lawyer*, James Moncreiff, 1867. Some writers have pursued this idea to its logical conclusion. For example in a grandiloquent treatise, *Letters to Henry Brougham on the state of Legal Education*, 1830, G. B. Mansel asserts that legal education begins at the first hour of the infant's birth. See also *Columbia Law Review*, 1943, Vol. XLIII, p. 431.

⁴⁹ *Reasons for the Study of Jurisprudence as a Science*, James Lorimer, 1868. John Austin also recognised that some professors erred "through not coming sufficiently into collision with practical men": *On the Study of Jurisprudence*, 1834.

⁵⁰ The two are not necessarily incompatible. To quote Mr. Justice Holmes: *Collected Legal Papers*, 1920, p. 200, "Theory is not to be feared as impracticable, for to the competent it simply means going to the bottom of the subject."

⁵¹ In "Some Controversial Points in the Teaching of Law," *Universities Review*, Vol. XXI, p. 16, Rupert Cross reports an English High Court judge as saying, "The influence of the academic lawyers is greater now than it ever has been and is greater than they themselves realise." It is thought the same could not yet be said for Scotland.

the need to reconcile our professional societies to the university law faculties? Critics are not lacking who suggest that too little⁵² (or too much)⁵³ attention has been given to the academic aspect of legal training in which one would expect the universities to excel.⁵⁴ The solution of the problem if it is to be found at all will be found not in the reform of the legal profession. As Hallam says, "there is no royal road to law."⁵⁵ The solution lies in the right ordering of the legal education for the profession. The wonder is that so little attention seems to be paid to such an important subject even today.

The high water mark of a campaign for a more practical approach to legal studies was reached when Sheriff C. de B. Murray some little time ago published an article in which he said: "I think it is perfectly sensible to say that a young lawyer should read no law books and attend no law classes,"⁵⁶ and when in an earlier article he declared, "the advocate learns his job in court: the solicitor learns his in a lawyer's office: the LL.B. or B.L. degree is neither here nor there."⁵⁷ In more moderate form the charge of too much book learning has not lacked distinguished apologists. Lord Cooper, for example, has written that it was formerly possible to graduate never having seen a closed record or a law report and never so much as having heard of relevancy.⁵⁸ Nevertheless, though these are strong words, I can find nothing which prevails against the weighty observations of Lord Collins that in general university students

⁵² So Rupert Cross, *cit. supra*, Cujacius (to quote the ancients) is said to have rejected all forensic experience with scorn stating that he had mis-spent his youth in such studies: *Law Magazine*, 1872, Vol. I, p. 284.

⁵³ Recent pronouncements by the Law Society of Scotland suggest that they incline to this view. See p. 47.

⁵⁴ Thus Professor J. Kirkpatrick: "You can no more separate law as a science from law as a professional implement without killing education than you can divorce soul from body without destroying life": *Journal of Jurisprudence*, Vol. XXX, p. 561. For the opposite view see Sheriff C. de B. Murray, *infra*.

⁵⁵ *History of the Middle Ages*.

⁵⁶ "The Teaching of Law" in *Scotsman* of August 29, 1951.

⁵⁷ 1950 S.L.T.(News) 1. Holmes expresses the opposite view in *Collected Legal Papers*, *cit. supra*, p. 155: "The place for a young man to study law is a law school, not a lawyer's office."

⁵⁸ "Legal Education in Scotland," 1922 *Scottish Law Review*, Vol. XXXVII, p. 71.

should approach the study of law "from the standpoint of theory and principle." "It is upon the grasp of principles that the claim of the law to be a liberal profession chiefly rests."⁵⁹ The function of university studies, it follows, is not to teach matters of pure practice,⁶⁰ but to prevent a great system from relapsing into chaos. To this orthodox view I subscribe, as also to another dictum of Lord Moncreiff: "Many think it is time enough to learn law thoroughly when they begin to practise it. It is far too late."⁶¹ In other words, principle first and practice later.⁶²

Though recognised by the university authorities, the apprenticeship system forms no part of their teaching, and the imparting of knowledge from master to pupil, though time-honoured in Scotland,⁶³ is today showing signs of becoming more and more of a rarity, at any rate in the country districts.⁶⁴ The Law Society, however, is at present seriously considering a recommendation that the period of apprenticeship be increased.⁶⁵ It has been said that Scottish legal education prior to 1707 was more "academic" in

⁵⁹ "Introductory Observations on the Study of Law," *Juridical Review*, Vol. XX, p. 291. "In the batch of wools that go to make up the yarn of professional character there is the strain of the scholar": Lord Clyde, *The Profession of the Law*, 1922.

⁶⁰ The pragmatist may be consoled by Graveson's assurance that "a university training makes life easier for the practising lawyer, for it teaches him to think as well as to remember": *Medico-Legal Journal*, Vol. XV, p. 79. Two things it cannot supply are common sense, and clients: N. J. D. Kennedy, 1905 *Juridical Review*, Vol. XVII, p. 246.

⁶¹ James Moncreiff, *op. cit.*

⁶² In *Letters to an Attorney's Clerk*, 1824, W. H. Buckland criticised the student who "endeavours to extract theory from practice, instead of first comprehending the theory and afterwards applying it to practice." "It is a mistake in any profession," wrote Hugh Barclay, "but chiefly in law to leave its learning until the period of practice": *Hints to Law Students*, 1849. And in "The Equipment of an Advocate," 1935 S.L.T.(News) 245, Lord Normand urges that the early years of a solicitor's career be used for learning. "The wisdom of a learned man cometh by opportunity of leisure; and he that hath little business shall become wise." L. C. B. Gower agrees, quoting the Committee on Education for Commerce, 1949, 1950 *Modern Law Review*, Vol. XIII, p. 190.

⁶³ It must have existed continuously from the times of the Roman juriconsults. It is interesting to note a report that "the legal profession in America have entirely disused it": 1905 *Juridical Review*, XVII, p. 246; *Harvard Law Review*, LVIX, p. 694. In England it has until recently hardly been rivalled.

⁶⁴ In 1953 there were only nine apprentices in Scotland outside the university towns: Report of Professor Boyd in *Scotsman* of June 18, 1954.

⁶⁵ *Annual Report of Council of Law Society of Scotland*, 1953, p. 41.

outlook than today when it follows England at a distance.⁶⁶ It is interesting to speculate what course legal education might have taken had effect been given to Bishop Reid's bequest for founding a college of Scots law in the sixteenth century.⁶⁷ No doubt academic instruction would even more have flourished. So far as the system of apprenticeship is concerned, probably no better method exists of seeing that entrants have some knowledge at least of practical matters.⁶⁸ Granted a poor master by lack of supervision or by exploitation can largely defeat the objects of the training, but where an apprentice is keen to learn he can hardly fail to absorb much that is of permanent value, even though his education may simply consist in pottering about among his master's books and papers. However, as the system is ancillary to the established university training its detailed consideration falls outwith the scope of this article.

To the lay mind law is a dry and difficult subject.⁶⁹ "Wanted," declared Lord Bowen in an address to the Birmingham Law Students Society in 1874, "a method of studying law pleasantly."⁷⁰ The problem of how to introduce the student to its study has in Scotland been mitigated by the fact that the first law degree to be established, namely

⁶⁶ "Stand Scots Lawyers where they Did?": 1940 *Juridical Review*, Vol. LVIII, p. 76. The enlightened statute of 1494 James IV, 5, c. 54, is often cited.

⁶⁷ *History of Edinburgh*, Hugo Arnot, 1816; *Charters, etc., of Town Council and Senatus of Edinburgh University, 1583-1858*, Alex. Morgan; "Story of Chair of Public Law in Edinburgh": Lorimer, in *Journal of Jurisprudence*, Vol. XXXII, p. 229; R. K. Hannay in *History of University of Edinburgh, 1883-1933*, ed. A. Logan Turner.

⁶⁸ So Lord C.J. Russell in (1895) 3 S.L.T.(News) 129.

⁶⁹ When first the student reads law "the huge sphinx appears almost buried in a desert of sand": *On the Profession of Law*, R. L. Edgeworth, 1808. James Moncreiff, *The Education of a Lawyer*, 1867, says somewhat equivocally, "It needs all the buoyancy of a vacant mind . . . law is the study of a lifetime": or as Roger North, *On the Study of the Laws*, 1824, p. 7, observes, "The profession of the law requires the whole man: he must not only read and talk but eat, drink and sleep law." "Reason is the life of the law," says Coke on *Littleton*, Bk. 1, Chap. 1, "gotten by long study, observation and experience." More depressing still is Sir John Fortescue's observation in *De Laude Legibus Anglicae*, c. viii, that "such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years." Some comfort, however, may be drawn from Dugald Stewart, *Philosophy*, Vol. I, p. 475, 6th ed.: "I have heard it observed that those who have risen to the greatest eminence in the profession of the law have been, in general, such as had at first an aversion to the study"; not to mention Coke's "Sex horas somno . . ."; Coke on *Littleton* I, 1.

⁷⁰ Quoted in *Law and Other Things*, Lord Macmillan.

the LL.B. of the Scottish universities in 1862, required (and still requires) a previous degree in arts. Thus students who proceed to the LL.B. are bound to have some acquaintance with other academic disciplines and are the better prepared ⁷¹ to attack and profit from their legal studies, even where they have taken advantage of the option ⁷² to include up to three legal subjects in the previous arts curriculum. Thus Scotland maintains the emphasis upon the *studium generale*. The difficulty of broaching the study of law or of finding a propaedeutic ⁷³ has therefore been in Scotland virtually confined to those who proceed to the B.L. degree. Up to the present they have had to plunge straight into their legal subjects.⁷⁴ That this has been found unsatisfactory is perhaps indicated by the fact that the regulations have recently been altered to the effect of broadening the basis of that degree and introducing several subjects of a general educational character which may help to graduate the transition from non-legal to legal disciplines.⁷⁵ In point of fact elementary jurisprudence, a subject "more practical than conveyancing," ⁷⁶ and "the lynch-pin of all higher legal studies," ⁷⁷ has generally been taught in the first or second

⁷¹ That the study of geometry or the humanities "prepares" the student for the reception of law is implied for example by Daniel A. Binchy in 1949 *Studies*, Vol. XXXVIII, p. 257. This theory of "transfer of training" is criticised in "Education for Law Teachers," H. Weihofen, 1943 *Columbia Law Review*, Vol. XLIII, p. 435.

⁷² That the option conferred no advantage whatever was argued by Lord Cooper in 1922 *Scottish Law Review*, Vol. XXXVIII, p. 71.

⁷³ See "General Education of the Law Student," J. L. Montrose, 1952 *Universities Review*, Vol. XXV, p. 20.

⁷⁴ This was the complaint of Mr. A. Amos of London University in his evidence before Select Committee on Legal Education, 1846, *Parliamentary Papers*, Vol. X, p. 62.

⁷⁵ The New Glasgow B.L. Ordinance (received assent of Her Majesty in Council on September 12, 1953), 1954 *Scottish Law Review*, Vol. LXX, p. 21: "It makes the best of two worlds." A New B.L. Ordinance for Edinburgh came into force on October 1, 1954. Comments on the new LL.B. regulations (received assent March 1, 1954) are contained in an article in 1954 *Scottish Law Review*, p. 73. They introduce the principle of delegated legislation, each Senatus having power, with the approval of the University Court, to prescribe regulations including modification of and addition to the subjects comprised in the curriculum.

⁷⁶ Professor Jolowicz, 1953 *Journal of Society of Public Teachers of Law*, Vol. II, p. 90. He declares it a subject which "explains why people go to concentration camps."

⁷⁷ Dr. D. A. Binchy in 1949 *Studies*, Vol. XXXVIII, p. 262.

year of both degree courses and has to some extent fulfilled the useful function of giving a general conspectus of the field of study.⁷⁸ A similar difficulty arises in finding suitable introductory textbooks, sufficiently simple to be both intelligible and interesting to the beginner and sufficiently trustworthy to guide his early steps. Good Scots textbooks are rare⁷⁹: good introductory manuals are non-existent. Gower's suggestion that an annual guide to the study of law should be published is a good one. Such a guide should contain the information required by those approaching the profession with a view to qualifying, together with some guidance on introductory reading and study.

Whilst criticism has always raged on the degree of practical training which should be admitted to the university curriculum even more criticism has centred upon teaching methods, the subjects composing the curriculum, and the examinations. Often (and understandably) the critics have been students, though their strictures have not always been published (or indeed publishable). A notable and workmanlike report was issued by a Commission of Glasgow University Law Society⁸⁰ which, reviewing the teaching of law

⁷⁸ The Continental *Encyclopaedia*, sprung from Liebnitz's *Nova Methodus*, has never found favour in Scotland: see article on "General Outline of University Education and Organisation of a Law Faculty," *Journal of Jurisprudence*, Vol. XXV, p. 169. Dr. Friedlander's *History of Juristic Encyclopaedia* is referred to in W. Hastie's *Outlines of the Science of Jurisprudence*, 1887. The use of jurisprudence as a propaedeutic was also described in an article by Geo. A. Matile in *Monthly Law Reporter* (Boston), 1862, Vol. XXV, p. 281.

⁷⁹ J. S. Duckers, *Guide to Students' Law Books*, 1906, commented that writers do not try to make their works interesting to the young: for instance they never use pictures. England was formerly equally short, but now the position is improved: *Law Review*, 1851, Vol. XIV, p. 392. They have for example G. L. Williams' excellent *Learning the Law*, commended to Scots students in a review in 1954 *S.L.T.(News)* 208. In view of American progress in this field it is interesting to read in *Monthly Law Reporter* (Boston), 1846, Vol. VIII, p. 55 that Warren's introductory manual was reviewed as "patent medicines for chronic idleness." The growth of law tracts for the use of practical pleaders in thirteenth century England is referred to in *Chief Sources of English Legal History*, by P. H. Winfield at p. 269. "Such men need handy manuals of practice. What the manual of infantry training is to the young soldier, that was the thirteenth century tract to the lawyer. They both tell a man what to do, not why he should do it. Neither is written for people who spend their lives in an armchair. Neither can help a man in an emergency or show him how to retrieve an error."

⁸⁰ Summarised in *Scottish Law Review*, 1939, Vol. LV, p. 194.

from the student's standpoint in 1939, condemned the traditional Scottish lecture system. Influenced no doubt by the prolific literature of the American law schools and by the novel methods of instruction and study such as the casebook system⁸¹ employed there, critics have suggested that "the dry, barren lecture system"⁸² should be abandoned in favour of, or at least supplemented by, tutorial groups,⁸³ exposition and discussion seminars, attendance in the courts,⁸⁴ dispensary work,⁸⁵ and even instructional films. In point of fact, of course, some of these methods are now in regular use at, for example, Edinburgh University, to supplement formal lectures.⁸⁶ Tutorial instruction is given in most of the main legal subjects taught, though in practice it tends to be simply a second more informal lecture delivered by a different (and generally less well informed) instructor. It may be that Scottish students do not easily overcome their native reticence and partake in the fruitful discussion of the law, a subject as Lord Collins assures us, "unique in the advantage which men derive from discussing with their fellow students."⁸⁷ The reticence however, if it exists, and the unproductiveness, which certainly is noticeable of the tutorial in Scotland, may rather be due to lack of knowledge

⁸¹ In *Education for Professional Responsibility*, 1948, Carnegie Press, p. 101, Professor K. N. Llewellyn suggests that the heyday of the casebook system in America is past. "Man could hardly devise a more wasteful method of imparting information." So also R. H. Graveson, *Journal of Comparative Jurisprudence*, 3rd Series, Vol. XXV, p. 54. As Lord Moncreiff observed in *The Education of a Lawyer*, 1867, case law "is a dangerous load for the legal brain until it has been trained to carry it."

⁸² *Edinburgh Law Journal*, 1831, Vol. I, p. 400.

⁸³ A. L. Goodhart warns that the tutorial may "degenerate into spoon feeding": 1950 *Journal of Society of Public Teachers of Law*, Vol. I, p. 333.

⁸⁴ "Without access (to the courts) it is hardly possible to study law": Lord Brougham and Vaux: *Evidence before House of Commons Select Committee on Legal Education*, 1846, p. 284.

⁸⁵ Lord Cooper in 1922 *Scottish Law Review*, Vol. XXXVIII, p. 71: In America the idea is not new; see Jerome Frank in *Courts on Trial*; and in "Aims and Methods of Legal Education," *Medico-Legal Journal*, Vol. XV, Pt. 2, R. H. Graveson criticises university education because it does not bring the law student into contact with people "in trouble."

⁸⁶ It should not be thought that Edinburgh is in all respects the most advanced. The law of succession is taught at Aberdeen by the "Case-method," and comparative law is there taught alone of the Scottish universities. Glasgow and Aberdeen now lead with classes in the history of Scots law.

⁸⁷ *Juridical Review*, Vol. XX, p. 291.

to furnish a basis for discussion. The essentials of a subject must be mastered before they can be discussed. Furthermore the tutorial method of instruction which may work well enough at Oxford or Cambridge is a foreign importation which need not meet the requirements of the Scottish universities.⁸⁸ So far as visits to administrative units such as hospitals and municipal offices are concerned these have been introduced in the diploma class of administrative law at Edinburgh University with some success, where films are also used to give some general acquaintance with administrative though not with specifically legal matters. No advantage, however, appears to have been taken in that university of the proximity of the Supreme Courts, and this is mentioned as something of a mystery in the article of 1922 by Lord Cooper which has been cited.⁸⁹ It remains a mystery to this day. To reserve a bench in the Divisions of the Inner House for final year students and still more to provide a students' room in the advocates' splendid library at Edinburgh might be to encourage the rise of a new generation of academic lawyers.⁹⁰

One valuable aid to study which was advocated in the Student Commission's Report alluded to has now been adopted in many of the law classes in the Scottish universities. This is a printed syllabus or synopsis⁹¹ of the lectures

⁸⁸ So Lord Campbell in his evidence before the 1846 Select Committee, *supra*, p. 290. Professor Ramsay of Glasgow was amongst the foremost in experimenting with a tutorial staff drawn from his best students in the humanity class; see his evidence before the Royal Commission on the Scottish Universities, 1876, *Evidence*, Vol. II, p. 960.

⁸⁹ 1922 *Scottish Law Review*, Vol. XXXVIII, p. 71.

⁹⁰ As Professor Dewar Gibb has written "a man seriously reading law needs facilities for surrounding himself with books, many of them simultaneously open": "Reform in the Scottish Law School", 1943 *Juridical Review*, Vol. LV, p. 152. The student requires to become accustomed to the rather terrifying appearance of the volumes of the library "in their uniform livery of law binding" and to learn that many books "are adapted only for occasional use": W. H. Buckland, *Letters to an Attorney's Clerk*, 1824. The student should be familiar with the use of books, but no modern teacher would require him to master fifty volumes as was recommended by Wm. Phillips, *Studii Legalis Ratio*, 1675.

⁹¹ The law faculty cannot claim to have been first to introduce this expedient. A medical handbook recently published was stated to have grown out of cyclostyled notes issued over the past twenty years, reviewed in *University of Edinburgh Journal*, Vol. XVI, p. 186. It is interesting to see how the notes led to

providing a guide to the skeleton of the subject of study and greatly assisting in the preparation of work, in the guidance of reading, and in the taking of comprehensible notes. That it also lends itself to the most effortless cramming is perhaps to be regarded from the professional side at least as something of a disadvantage, and one Edinburgh professor⁹² has warned that for that reason the synopsis should not be too detailed.

The discussion of cases and the study of hypothetical problems⁹³ has not, so far at any rate, found much favour in this country, but some practical work is done in the Edinburgh conveyancing classes in the drawing of deeds and in the evidence class in framing pleadings to suit hypothetical cases.⁹⁴ Doubts have been expressed as to whether these activities should not be regarded as merely ancillary to the academic teaching, but their usefulness and popularity are not disputed.

The principal contention of many of the critics of our teaching methods, however, remains. Formal systematic lectures constitute "the backbone of Scottish law teaching"⁹⁵ in our universities, as they have done for generations.⁹⁶ It has been said that lectures were permissible in

the publication of a textbook. Perhaps a remoter ancestor of the modern syllabus was the "printed course" proposed in 1642 to defeat the inveterate note taker and to unify the instruction of the Scots colleges. Fortunately nothing came of the proposal so far as law was concerned: *University of St. Andrews*, R. G. Cant, p. 69.

⁹² Professor A. H. Campbell in "Legal Education," 1950 *Juridical Review*, Vol. LXII, p. 267. In Paris apparently the cyclostyled lecture notes can be purchased by students. In Russia "lithographed lectures" are bought at a stiff price. They receive official recognition and examination questions are often based on them. *The German Universities and University Study*, F. Paulsen (tr.) 1906.

⁹³ In a book review in 1951 *Journal of Society of Public Teachers of Law*, Vol. I, p. 474, there is mention of a class in London University in which students have a print of an actual criminal case to follow in their study of the rules of procedure. Manchester University requires a weekly essay or solution of a set problem: 1949 *Journal*, Vol. I, p. 272.

⁹⁴ Jerome Frank's criticism is that law students are like future horticulturists, studying solely cut flowers. Quoted in article cited in 1950 *Juridical Review*, Vol. LXII, p. 267.

⁹⁵ A. Dewar Gibb, 1943 *Juridical Review*, Vol. LV, p. 152.

⁹⁶ Prior to 1830 such law degrees as were granted in Scotland were conferred without examination. The first attempt I can trace to mitigate "the dry barren lecture system" was the lecture course of Mr. Bayne of the Juridical Society: *Edinburgh Law Journal*, 1831, Vol. I, p. 400. It is interesting to note that an English journal describes the English university law teaching of the time as

the eighteenth century, but that they are outmoded today⁹⁷; that they are but a bad substitute for books⁹⁸; that they amount to "a protracted series of oral correspondence courses"⁹⁹; that they encourage "human phonographs"¹; that they encourage students to accept law uncritically as it is²; and fail to teach judiciousness³; that no professor of Scots law has a department organised on modern lines.⁴ "Why," demands one writer, "has the lecture survived Caxton?"⁵ Yet while bad lectures can be bad indeed, good lectures provide a pleasant stimulus⁶ to learning which

"cramming" and the law chairs, London excepted, as "a farce": *Legal Examiner*, 1832, Vol. I, p. 529. However, Mr. A. Amos in his lectures at London University was in the habit of introducing the discussion of actual cases, and producing exhibits from criminal trials to make them more interesting. "Such appeal to the eyesight often produced a considerable effect": Report of 1846 Committee, *supra*, p. 96.

⁹⁷ C. de B. Murray, 1950 S.L.T.(News) 1; *Journal of Jurisprudence*, Vol. III, p. 615.

⁹⁸ *Legal Examiner and Law Chronicle* (Lond.), 1832, Vol. I, p. 12. But Lord Ashburton assures us that "the most painful plodder can never arrive at celebrity by mere reading": *Legal Observer*, 1830, Vol. I, p. 102.

⁹⁹ Lord Cooper, 1922 *Scottish Law Review*, Vol. XXXVIII, p. 71: as an index to the change in ideas on this subject it is interesting to recall Lord J. C. Hope's Memorandum of April 14, 1846, on the Dublin Law Institute in which he advocated that students be encouraged to take down in full notes the substance of the lectures and extend them at home. See Report, 1846 Select Committee, *supra*, p. 355. So an article on "Mode of Study" in *Law Students Magazine*, 1853, Vol. V, p. 477, advocates elaborate note-taking. Even a modern writer says "the taking of notes is a most valuable part of a university training": 1949 *Universities Quarterly*, Vol. IV, p. 257.

¹ S. Post Simpson, 1945 *Harvard Law Review*, Vol. LIX, p. 694. Samuel Warren in his *Popular and Practical Introduction to Law Studies*, p. 14, uses of the lecturer the expression "a speaking treatise." A Canadian opinion is that the lecture "tends to kill legal education and scholarship": 1937 S.L.T.(News) 22.

² E. N. Griswold, 1952 *Annual Law Review*, Vol. II, p. 207. In *Judicial Precedent in Scots Law* Professor T. B. Smith suggests that the trend of legal education in nineteenth-century Scotland encouraged uncritical reliance on precedent.

³ A. V. Dicey, *Can English Law be Taught at University*, 1883. He defines it as "the power to estimate what is likely to be the judicial view of good sense." This recalls Roger North's dictum in *On the Study of the Laws*, 1824: "The end aim of a lawyer is duplex—first to know, and second to appear to know: the latter brings in clients, the former holds them."

⁴ 1940 *Juridical Review*, Vol. LVIII, p. 26. It must of course be remembered that in the Scottish universities most law students spend their day in an office and come to the afternoon lectures at least "with a full stomach of law": Amos, *Legal Examiner*, Vol. II, p. 221.

⁵ 1949 *Universities Quarterly*, Vol. IV, p. 239.

⁶ "Many may be induced to attend lectures as a relaxation at hours which would otherwise be lost": *Law Magazine*, 1838, Vol. XX, p. 246. "There is a monotony attending retired study . . . the effect of oral communication is to keep the mind upon the alert": F. Ritso, *Introduction to the Science of the Law*, 1815, p. 146. So P. Anstie Smith, *History of Education for the English Bar*, 1860, p. 135, notes the advantages of "companions in study."

nothing can replace. The remarks of a nineteenth-century teacher, Alexander Strathearn, addressed to the legal apprentices of his day could hardly be improved upon: "Now lectures, you must be told," he wrote, "are not intended to give finished notions to those who have no access to books . . . lectures excite the desire to read, and point directly to the way in which the best course of reading can be taken."⁷ The books will supply the want which the lectures will have created. The lecturer will not have told his pupils all that they feel desirous to know, but he will have taught them how to seek for knowledge and where to find it."⁸ Such vital personal contact,⁹ "the impact of mind on mind,"¹⁰ is the ideal. There is a secondary reason for the retention of the lecture system which was mentioned by Dicey in the inaugural lecture referred to. This is that the compiling of lectures tends to encourage the production of textbooks¹¹ just as the production of the synopsis in a lesser degree has led to the formulation of introductory manuals. Had it not been for the lecture system the works of Hume, Erskine and Bell might never have seen the light of day. Parts also of Stair's *Institutes* are traceable to his lectures delivered as Regent in Glasgow University. The same may be said, it appears, for several lesser treatises prepared for the purpose of private or public lectures.¹² Another advantage of the lecture system is that it introduces a social element into the study of law. Those who have had to study law alone in chambers have written of "the utter seclusion

⁷ This is the "proper object" of lectures: *Journal of Jurisprudence*, Vol. VIII, p. 496.

⁸ *Suggestions to Legal Apprentices*, 1857, Alexander Strathearn. Much has been written on "where to find it." Roger North's remark about the duplex aim of the lawyer has been quoted. So Dr. Johnson: "Knowledge is of two kinds: we know a subject ourselves, or we know where we can find information upon it": *Boswell's Life*, Vol. III, p. 75. Training in the use of index and digest is important.

⁹ Walter Bagehot: "Bad Lawyers or Good?" 1870 *Fortnightly Review*, p. 701.

¹⁰ "That is the sole justification of oral instruction. Personal contact": Sir Wm. Hamilton Fyfe in 1949 *Universities Quarterly*, Vol. V, p. 239.

¹¹ "Our best books have been written in connection with lectures": *Law Magazine*, 1847, Vol. II, p. 175.

¹² Some Scots examples are mentioned on p. 28. A list of such works in English law is given in P. A. Smith's *History of Education for the English Bar*, p. 157.

of legal study.”¹³ There is a stimulus in sharing with other young men and women simultaneously engaged in the pursuit of knowledge. Indeed there is yet another use to which the law lecture might be put, and that is the occasional medium for addressing *publice* the whole assembled faculty of a law school. This was one of the ideas which Lorimer hoped to establish as a permanent feature of university life. His introductory lecture, delivered in 1864 on “The Sphere and Functions of an Academical Faculty of Law”¹⁴ stands as a reminder of what might be accomplished in this field today. The revival of this custom might be a powerful factor, in the hands of the right man, in the movement to give greater authority to the academic student and professor of law. The conclusion of the matter, however, seems to be that nothing can or should take the place of the traditional lecture system as the principal method of teaching law, at any rate in the Scottish universities.¹⁵

It is probable that a sufficient emphasis is not placed in the Scottish universities upon the private reading¹⁶ of the student. It is possible, as the writer has proved, to graduate with only the information imparted in the formal lectures. This is not desirable. In part it may be due to the lack of adequate law libraries; or to the inaccessibility of the existing ones.¹⁷ Adequate provision for advanced reading and

¹³ *Law Magazine*, 1872, Vol. I, p. 276.

¹⁴ *Law Magazine*, 1863, Vol. XVI, p. 301.

¹⁵ This is not to deny the usefulness of the other methods as extras. Professor J. L. Montrose wrote that the best training for practice “includes” the study of law at university: “General Education of the Law Student,” *Universities Review*, 1952, Vol. XXV, p. 20. And Professor A. L. Goodhart writes: “I believe that the best method of teaching law is an amalgam of lectures, tutorials and discussion classes”: 1950 *Journal of Society of Public Teachers of Law*, Vol. I, p. 333.

¹⁶ Once again Gower advocates instruction in the use of books, indices and reports: 1950 *Modern Law Review*, Vol. XIII, p. 203. Lord Bacon regarded it as an error to rely on lawyers who were “only men of practice and not grounded in their books”: *Advancement of Learning: Works*, Vol. II, p. 16.

¹⁷ The library of Glasgow Faculty of Procurators has an honourable record in this connection, but in 1853 Professor Maconochie intimated that “until adequate accommodation and a suitable law library were provided he would cease teaching the class of Scots law”: *History of University of Glasgow*, Jas. Coutts, p. 391. English students, too, have felt the need of a library: see P. A. Smith, *supra*, at p. 197.

research is lacking.¹⁸ As an example of the conditions prevailing there is only one copy to be found in all Scotland of the *Journal of the Society of Public Teachers of Law* available to the public, and that is in the Advocates Library in Edinburgh. There are only two copies of *Cambridge Law Journal* in Scotland and three of *Modern Law Review*, to name two other important English publications. But if lectures and private reading are important as the main means of instruction and study they are not the only means. The auxiliary means, tutorials, practical classes, films¹⁹ should be used increasingly where this can be done with effect. In particular there should be no excuse for a law student in Edinburgh graduating without having at least learned the location of the Supreme tribunals.

If the methods of teaching law have suffered criticism in legal periodical literature, no less have the methods of examination. Professor L. C. B. Gower, in an interesting survey of English legal training,²⁰ makes the point that in England the whole examination system is little over 100 years old.

¹⁸ In "The Aims of Legal Education," *Cambridge Law Journal*, Vol. IX, p. 286, Professor E. C. S. Wade mentions the "crying need for research" in England and makes the important observation that unlike the physical scientist who can at once turn to research as part of a team "the lawyer needs a more complete apparatus in the shape of experience of the law in action before his education is completed and he can profitably turn to research." Yet research is as important in law as in medicine: J. C. Gardner, 1926 S.L.T.(News), p. 29. It may be asked why the standard in law is lower than in medicine: T. M. Cooper, 1928 S.L.T.(News) 27. It should be undertaken by graduates: F. W. Maitland, *Collected Papers*, Vol. III, p. 431; not on the central topics of jurisprudence in the early years: A. H. Campbell, 1946 S.L.T.(News) 5; and teachers are the most likely to undertake research: A. E. W. Hazel, 1931 *Law Quarterly Review*, Vol. XLVII, p. 506. Dr. Jenks casts an unintended slight upon Scotland when he writes of research "so lamentably neglected in England alone of civilised nations": 1907 *Law Quarterly Review*, Vol. XXIII, p. 266.

¹⁹ Expense is likely to be the limiting factor, especially so far as films are concerned: 1946 *Modern Law Review*, Vol. VI, p. 24. A tape recorder might be a useful addition to the equipment of the law student societies for use in promoting public speaking and its study. The use of "sound scribes" is referred to in 1948 *Harvard Law Review*, Vol. LXII, p. 155, in a book review.

²⁰ "English Legal Training: A Critical Survey": 1950 *Modern Law Review*, Vol. III, p. 137. It is a mistake, however, to think that there was no legal education in the Middle Ages: H. Cohen, *The Spirit of our Laws*, p. 281. But C. J. Hamson considers that university study of law in England "is an exceedingly new thing," "after rather than before the First World War": *Journal of Society of Public Teachers of Law*, 1952, Vol. II, p. 19. Certainly the Select Committee of 1846 thought that "no legal education worthy of the name of a public nature" was given then in England: Report, p. 56.

The same may be said of Scotland, where the first competitive law degrees were awarded after examination under the General Ordinances of 1864.²¹ A hundred years where the law is concerned is not a particularly long time so we need hardly be apprehensive if some alterations are mooted. Most of the Scottish critics have felt that the questions asked in examination reveal that the examiner is only expecting to have retailed to him an extract from the class lectures, and the more faithfully the better.²² An English critic has described the process as "the mortgage of information, subject to redemption by examination."²³ Hence it is said, examinations tend to provide only "a fallacious test" of whether the student "has been made familiar thoroughly and systematically with the whole of the ground over which he is to act as guide during his professional life."²⁴ Here we see clearly the divergent aims of the university and the professional bodies. The former do not (or should not) examine with a view to assuring themselves that the candidate is fit to practise: they examine for general academic qualification. As the two are not necessarily the same thing it is very common in the countries where the different bodies vie with one another for a professional body which accepts

²¹ Prior to the Scottish Universities Commission degrees had been entirely honorary although the law classes were used "by universal custom as the course of preparation actually followed by the generality of students": 1830 Report, p. 63; the Scots law class at Edinburgh in 1830 had 250 students, but the effectiveness of the training may be revealed by the happy remark that "in this class there has never been any examination whatsoever": Report, p. 102. Such examination as did exist in other classes was entirely oral and consisted in regular periods of questioning by the professor, usually in Latin, upon some selected Roman text. "The Report of a Seventeenth Century Procurator's Examination" in 1931 *Juridical Review*, Vol. XLIII, p. 337, is of great interest. Written examinations were introduced with the competitive degrees. This is not to say that Scotland had no powerful academic figures. John Millar, a nineteenth-century professor of law at Glasgow, drew students from as far afield as Russia: *The University of Glasgow, 1451-1951*, J. D. Mackie, pp. 233 *et seq.*

²² "Legal Education in Scotland," 1922 *Scottish Law Review*, Vol. XXXVIII, p. 71, like repeating back a telegraph message, says 1896 *Law Times*, Vol. C, p. 243. Often the examiner has his favourite questions: W. J. Dobie, 1939 S.L.T. (News) 81. To avoid too frequent recurrence American law schools operated a "pool" of questions for law teachers: "Education for Law Teachers," 1943 *Columbia Law Review*, Vol. XLIII, p. 428.

²³ J. D. I. Hughes, 1924 *Journal of Society of Public Teachers of Law*, p. 28; W. J. Dobie, "The Examination Aspect," 1939 S.L.T. (News), p. 81.

²⁴ "Possibilities in Legal Education," E. Jenks, 1907 *Law Quarterly Review*, Vol. XXIII, p. 266.

a university degree as exempting²⁵ from certain of its examinations to require in addition a pass in one or more specific subjects of its own teaching. These subjects are treated in a more empirical manner than is usual at university. In Scotland, however, the warfare which has raged elsewhere between academic and professional bodies has not so far²⁶ broken out openly, and it is now possible to satisfy professional requirements in Scotland entirely by subjects taught at university. This "diploma privilege" of Scots degrees may of course prove a mixed blessing, for it may tend to make the curriculum too vocational; as against this it must be admitted that the present arrangements seem to be fairly acceptable. There is at least an entirely laudable absence of coaches and "crammers." Nevertheless the method of examination, even from the strictly academic standpoint, leaves much to be desired, and Professor Gower's suggestions²⁷ are worthy of consideration. In his view the time factor has been allowed to count for too much, and every student who has anxiously raced the clock in examinations will agree with him. He suggests that examinations in his own country might take the form of "elongated practical tests" in which the candidate would be given particulars of the problems he is required to solve along with free access to a variety of statutes, reports, textbooks and styles. To examine a lawyer without allowing him reference to his books is, he suggests, like trying to test the practical proficiency of a carpenter without allowing him the use of his tools. Such protracted examinations would require to be supplemented by more searching *viva voce* examinations than

²⁵ Such concessions are tacit tributes to the value of the law degrees: Gower, 1950 *Modern Law Review*, Vol. XIII, p. 149.

²⁶ Not so far; but the indications that it might are contained in a speech made on March 27, 1953, in which the President of the Law Society is reported as having said that the society should look to whether they might not establish a practical legal education system and leave academic matters to the universities. See also Appendix to *Scottish Law Gazette*, Vol. XXII, No. 3, pp. 14 *et seq.* where the burden of university studies is discussed.

²⁷ 1950 *Modern Law Review*, Vol. XIII, p. 193. An experiment in the answering of questions with the aid of books had been suggested by the Glasgow Students Commission in 1939 *Scottish Law Review*, Vol. LV, p. 194.

are at present in vogue.²⁸ Scotland should give them a trial.

Turning from examinations to the even more controversial subject of curricula one is confronted with a multitude of competing claims. Although the traditional aim of our legal education has been to produce the liberally educated gentleman²⁹ rather than to encourage the enthusiast for a particular branch of law, the pressure of new subjects clamouring for attention within the limits of the curriculum has led to a demand for more specialisation and sometimes for particular subjects to be treated anew or at greater length by extra-mural³⁰ or at any rate specialist³¹ lecturers. This is a demand to which the Scottish universities should not too readily concede,³² although the allied suggestion frequently made that professors of law should be excluded from practice

²⁸ Oral examinations alone were in use in Scotland until the later nineteenth century, when written examinations were reluctantly added. In fact oral examinations are now practically a matter of form, though the writer has known examiners to pass a candidate who gave a poor written paper but redeemed himself in oral examination. In Austria, prior at any rate to the Anschluss, all examinations were oral: 1939 *Scottish Law Review*, Vol. LV, p. 166. In England the university examiners have the right to examine *viva voce* but "little if any use seems to be made of this privilege": H. D. Hazeltine, 1910 *Law Quarterly Review*, Vol. XXVI, p. 17.

²⁹ "Scotland exported to England the ordinary degree system": *UNESCO Report, "The Teaching of the Social Sciences in the United Kingdom,"* 1953, p. 55. In England, too, "the general aim of the training of the noble or gentleman had many points of contact with the professional training of the lawyer": Professor Foster Watson, *Beginnings of Teaching of Modern Subjects in England*.

³⁰ The demand for extra-mural teaching to supplement the existing Chairs was made before all the Royal Commissions on legal education but to no avail. The Faculty of Advocates also backed the suggestion: Report of Committee, December 9, 1884.

³¹ R. L. Edgeworth, *On the Profession of the Law*, 1808, suggested that "those who have retired from the Bar to learned leisure" might help with teaching. A writer in *Journal of Jurisprudence*, Vol. III, p. 615, wanted a dozen or so specialist professors for Edinburgh. Professor Lorimer favoured throwing the whole teaching of the Law Faculty open to competition: Royal Commission, 1876, *Evidence*, Vol. II, p. 366. And an article in *Scottish Law Review*, Vol. V, p. 125, suggests that advanced subjects might be taught by "some of our experienced judges." An English writer also wanted to press judges into service as study-advisers: *Law Times*, Vol. CIX, p. 167.

³² Professor A. N. Whitehead has written, "The increasing departmentalisation of universities during the last 100 years, however necessary for administrative purposes, tends to trivialise the mentality of the teaching profession": quoted in *Education for Professional Responsibility*, *cit. supra*. A challenging article condemning the "twin idols" of "specialisation" and "utility" is D. A. Binchy's "Law and the Universities," 1949 *Studies*, Vol. XXXVIII, p. 257.

has more to commend it.³³ The result of excessive specialisation is only too plain in the United States where concentration on "skills techniques" of all sorts has led to the abandonment of the traditional university treatment "for something that smacks of Dale Carnegie or Charles Atlas."³⁴ As was observed a century ago "America is an example and a warning."³⁵

"Of the making of curricula," says one writer,³⁶ "there is no end." Fashions change here as elsewhere. The early works on legal education exhort the student to apply himself to geometry³⁷: to indulge only in the mildest relaxations³⁸: to beware lest he neglect time "which is a consuming treasure"³⁹: to shun "the pernicious habit of novel reading,"⁴⁰ and to rise and study early.⁴¹ Professor Dewar Gibb's article of 1943⁴² contains as clear a résumé of the main points of controversy on the more modern aspects of the curriculum as can be found. He dislikes the freedom which the Scottish University Ordinances allow in the choice of subjects and in the order in which they may be studied. He complains, for example, of the undoubted "barbarism" of allowing jurisprudence as an alternative to medical jurisprudence in the Glasgow Calendar, and the introduction

³³ It is frequently argued that practice is incompatible with teaching. So R. L. Edgeworth, *cit. supra*; *Law Magazine*, 1831, Vol. V, p. 422, and 1858, Vol. II, p. 7; Professor Lorimer: "Legal Education in a University," *Journal of Jurisprudence*, Vol. XXVIII, p. 598; J. McLaren, Royal Commission, 1876, *Evidence*, Vol. II, p. 104; and other modern writers such as G. R. Y. Radcliffe, "Outline of Legal Education," 1937 *Year Book of Education*, p. 882. Certainly our law faculties have few really accomplished lecturers.

³⁴ *Education for Professional Responsibility, cit. supra*, p. 17.

³⁵ Report of Committee of Faculty of Advocates on Entrance Qualifications: July 11, 1854.

³⁶ Dr. A. E. W. Hazel, 1931 *Law Quarterly Review*, Vol. XLVII, p. 510.

³⁷ Lord Ashburton, *Letters to a Young Gentleman*. And Roman law is commended because "there is nothing which approaches so near to the exactness of pure geometry": *On the Civil Law*, 1827, Douglas Cheape.

³⁸ In his *Course of Legal Studies addressed to the Profession generally*, 1836, p. 42, David Hoffman advises "partial ablutions, especially of the forehead, hands and wrists, frequent brushing of the hair, gentle walking in the streets musing on the most trivial subjects."

³⁹ Wm. Fulbeck, *Direction or Preparative to the Study of Law*, 2nd ed., 1829, p. 45.

⁴⁰ Wm. Wright, *Advice on Study and Practice of Law*, 2nd ed., 1824, p. 80.

⁴¹ Fulbeck, *op. cit.*, p. 48: "If a man study soon after supper the nourishment is resolved into gross vapours which do fill the body and are very noisome obstupatives to the senses."

⁴² 1943 *Juridical Review*, Vol. LV, p. 152.

there of mercantile law "for the convenience of C.A. students" which results in an un-coordinated curriculum. Here is an echo of the criticism in the article by Lord Cooper which has been mentioned referring to the overlapping⁴³ of courses and suggesting the reconstruction of the scheme of study. This is particularly evident, maintains Professor Dewar Gibb, in the case of Scots law where the boundaries of the subject ought to be clearly defined.⁴⁴ These criticisms have to some extent been met by the Ordinances which are to take effect in the near future. The first articles dealing with the Ordinances are referred to at p. 37. Pleas have also been made in Scotland and over the Border for a study of criminal law⁴⁵ and criminal science,⁴⁶ the sociological aspects of law,⁴⁷ interpretation of documents,⁴⁸ public administration,⁴⁹ income tax law,⁵⁰ factory and industrial law,⁵¹ the history of law,⁵² public international

⁴³ 1922 *Scottish Law Review*, p. 71. So also Hugh R. Buchanan, 1926 *Scottish Law Review*, p. 6.

⁴⁴ And extended: C. de B. Murray, 1932 S.L.T.(News) 29; W. J. Dobie, 1939 S.L.T. (News) 81.

⁴⁵ *Law Magazine*, 1847, Vol. VI, p. 191; *Report of Committee on University Instruction in Law: Faculty of Advocates*, 1855; also C. de B. Murray, *loc. cit.*; F. W. Maitland, *Collected Papers*, Vol. III, p. 429; 1831 *Law Chronicle* (Edin.), Vol. IV, p. 4; Hugh R. Buchanan, *loc. cit.*; Lord du Parcq, *The Place of Criminal Law in Legal Education*, 1938, and many others. It is interesting to read that William Empson, Professor of Law at Haileybury School, was in the mid-nineteenth century including Scots or English criminal Law, "the one or the other," in the curriculum of the pupils of that school who intended to proceed to the civil service in India: *Evidence*, 1846, Select Committee, *supra*, p. 47; H. D. Hazeltine refers to it as "a fundamental subject" in 1910 *Law Quarterly Review*, Vol. XXVI, p. 17; though Scotland gives criminal law scant attention it is noteworthy that the first Chair of Forensic Medicine in the United Kingdom was founded at Edinburgh in 1807.

⁴⁶ 1940 *Juridical Review*, Vol. LVIII, p. 26.

⁴⁷ L. C. B. Gower, 1950 *Modern Law Review*, Vol. XIII, p. 203.

⁴⁸ *Report of Select Committee on Legal Education*, 1846, Sir Richard Bethell at p. 66; "Law in the Universities," W. T. S. Stallybrass, 1948 *Journal of Society of Public Teachers of Law*, Vol. I, p. 163; and semantics, "the whole material of law is words," Professor Jolowicz in 1953 *Journal of Society of Public Teachers of Law*, Vol. II, p. 85.

⁴⁹ *Report of Committee on Faculty of Law and Legal Education: Faculty of Advocates*, 1884; Sir G. Stephen in evidence before the Select Committee on Legal Education, 1846, *Parliamentary Papers*, 1846, Vol. X, p. lx; *Public Administration*, 1949, Vol. XXVII, p. 29; 1953 *Journal of Society of Public Teachers of Law*, Vol. II, p. 62.

⁵⁰ *On Legal Studies*, Jas. Mitchell, 1862; L. C. B. Gower, *loc. cit.*

⁵¹ A. Dewar Gibb, 1943 *Juridical Review*, Vol. LV, p. 152.

⁵² 1926 S.L.T.(News) 29; 1939 *Scottish Law Review*, Vol. LV, p. 194. Lord Kames, *Historical Law Tracts*, Preface, p. iii: "Law then only becomes a

law,⁵³ psychology,⁵⁴ advocacy,⁵⁵ and other subjects such as professional ethics⁵⁶ having a more or less legal flavour. All no doubt have particular value to individuals though not necessarily to the general practitioner but in some cases their cultural value is too slender to justify academic treatment.⁵⁷ The Americans were among the first to awaken to

rational study when it is traced from its first rudiments, through its successive changes"; "A page of history is worth a volume of logic": Oliver Wendell Holmes; "Law and history are sister sciences," wrote F. Ritso, the prisoner-of-war at Verdun, in his *Introduction to the Study of the Science of Law*; "il faut éclairer l'histoire par les lois et les lois par l'histoire": *Esprit des Lois*, I, 31, c. ii, Montesquieu; "without it a lawyer cannot be accounted learned in the laws": Roger North, *On the Study of the Laws*, 1824, p. 40; 1831 *Law Chronicle* (Edin.), Vol. IV, p. 5; in his volume, *Supra Crepidam*, Lord President Cooper shows that the Scots lawyer is obliged to be more historically minded than the lawyers of other States. Professor Plucknett reported in 1954 S.L.T. (News) 206.

⁵³ G. P. Cheshire, 1947 *International Law Quarterly*, Vol. I, p. 14; James Moncreiff, *The Education of a Lawyer*, 1867; and Sir Arnold McNair has written: "By reason of its history, geography and its large fishing industry, the law schools of Scotland are well situated to make a more substantial contribution to public and private international law than at present": 1952 *Journal of Society of Public Teachers of Law*, Vol. II, p. 10.

⁵⁴ T. J. D. Connolly in 1930 *Scottish Law Review*, p. 145; and in Ireland for psychiatry by Duffy J., 1949 *Studies*, Vol. XXXVIII, p. 270; also Gower, 1950 *Modern Law Review*, Vol. XIII, p. 203. An experiment in treating the psychological issues raised by a case is referred to by Dr. W. P. M. Kennedy of Toronto in *Cambridge Law Review*, Vol. VII, p. 399.

⁵⁵ James Moncreiff, *loc. cit.*; "Legal Education in Glasgow," 1939 *Scottish Law Review*, Vol. LV, p. 194; arguing for the teaching of this art in 1948 *Harvard Law Review*, Vol. LXII, p. 56, F. B. Wiener quotes Sir W. S. Churchill's remark on his thirty most active and fruitful years as "years of action and advocacy": *The Gathering Storm*, Vol. IV, 1948.

⁵⁶ Legal education, academic and professional: 1913 *Law Quarterly Review*, Vol. XXIX, p. 406; Gower, *loc. cit.*; Courtney Kenny, 1939 *Scottish Law Review*, Vol. LV, p. 194; Legal ethics is a first-year subject in New South Wales: *Scottish Law Agents Gazette*, Vol. XIII, p. 67.

⁵⁷ Conveyancing was regarded as a borderline case by the commission appointed to visit the Scottish universities: Report, 1830. So W. T. S. Stallybrass, 1948 *Journal of Society of Public Teachers of Law*, Vol. I, p. 157, says: "Conveyancing has the same value for the legal mind as irregular verbs for the classics." Menzies in the Preface to his work on conveyancing gets over the difficulty by declaring: "Learning is regarded as the peculiar property of the lawyer and his professional characteristic . . . knowledge must be rendered practical and real by a testing process in the course of its acquisition." Perhaps this subject falls into the category of the crops mentioned by R. L. Edgeworth, *On the Profession of Law*, 1808, "which the farmer sows not for the sake of the profit they afford, but for the benefit they are of to the soil"; but Dr. D. A. Binchy classes this and "all the so-called practical subjects" as "quite unsuitable instruments for conditioning the youthful mind": 1949 *Studies*, Vol. XXXVIII, p. 260; Professor Friedmann thinks "a period of practical training in a parliamentary draftsman's office would seem to be as necessary a qualification for the modern lawyer as conveyancing or a knowledge of trust deeds": 1951 *Annual Law Review*, Vol. I, p. 96; to descend to the ridiculous, the

the fact that the duties of a practising lawyer may call for an ability to fix and follow a policy based on non-legal as well as on legal considerations, and that therefore the modern lawyer must be "an officer of civilisation."⁵⁸ The influence of social studies upon the composition of the curriculum is now clearly evident and seems to bear out Professor Lorimer's early insistence that the proper study of law is mankind.⁵⁹ Educational time is limited, however, and there is ground, though it must be cautiously explored for Professor Dewar Gibb's observation that "a greater degree of specialisation in teaching would not come amiss."⁶⁰ The curriculum is already everywhere overburdened⁶¹ and further additions would probably mean that something would have to be dropped. Particularly in England Roman law, a subject which has been "more praised than studied,"⁶² is the favourite candidate.⁶³ Without embarking on the details of the discussion, which have been fully canvassed, it has to be conceded that the labour required to

Eunomus held a knowledge of cookery essential to an intelligent appreciation of Coke on *Littleton*: 1872 *Law Magazine*, Vol. I, p. 276; this is to take Finch's dictum, "all the sciences of the world are raked up in the ashes of the law" rather too seriously. "It is hardly possible to mention any topic or any subject upon which sooner or later a solicitor in large practice may not find himself deeply engaged": Sir George Stephen in evidence before the 1846 Select Committee.

⁵⁸ "Legal Education," R. H. Graveson, *Journal of Comparative Legislation*, 3rd Series, Vol. XXV, Pt. III, p. 54.

⁵⁹ See p. 27, note 6.

⁶⁰ 1943 *Juridical Review*, Vol. LV, p. 152. Lorimer held a similar view: 1863 *Law Magazine*, Vol. XVI, p. 319.

⁶¹ So Professor E. C. S. Wade in *Cambridge Law Review*, Vol. IX, p. 286, says, "to overload the syllabus with a mass of subjects and complex detail means inevitably that our students lose sight of the law as a great human institution serving social and economic needs, which alone is the justification for its existence and enforcement on the people it exists to serve."

⁶² *On the Study of the Civil Law*, 1827, Douglas Cheape.

⁶³ Professor Gower would like to "kill the heresy that a knowledge of Roman law is essential for a lawyer": 1946 *Modern Law Review*, Vol. VI, p. 211; Austin, *On the Study of Jurisprudence*, regarded it as salutary but "not necessary," and one of the early Scots abolitionists was George Combe, *Edinburgh Law Journal*, 1831, Vol. I, p. 334; Dr. Hazel in 1931 *Law Quarterly Review*, Vol. XLVII, p. 509, regarded it as "a luxury"; the Glasgow Student Commission decided that "too much time relatively speaking is spent on civil law": 1939 *Scottish Law Review*, Vol. LV, p. 194; and F. Paulsen in *German Universities and University Study*, 1906, remarked, "there will probably be an increasing disinclination to make it the point of departure for the study of all law."

master the technicalities of the subject (sufficiently at any rate to secure a pass) provides the principal stumbling block to students in the acquisition of a law degree of the Scottish universities. That this should be so is not necessarily a bad thing. The influence of Roman law upon Scots law and the Scottish way of thinking has at all events been considerable and merits in itself a careful study.⁶⁴ Whilst it would be advantageous, perhaps, to curtail⁶⁵ the curriculum of Roman law to a carefully selected review of the principles which have been received into our own law or which are of interest from the comparative point of view, greater attention should logically be given to the subject here than in the common law countries.⁶⁶ In any event the value of Roman law as a comparative study must not be overlooked.⁶⁷

A study of the Scottish law lists and the university graduation lists over the years since the First World War provides some interesting information⁶⁸ as to the incidence of university education amongst practising lawyers. For instance the criticism that university degrees are "neither here nor there"⁶⁹ would not so far appear to have commended itself to the majority of the profession. Indeed the following classified table of solicitors practising in Edinburgh and Glasgow in three selected years reveals that the percentage holding degrees has steadily increased in both

⁶⁴ A valuable essay, "Two Ways of Thinking" is contained in Lord Macmillan's *Law and Other Things*, at p. 76.

⁶⁵ I am not an abolitionist. As one writer says, "we can no more dispense with the Romans to teach us law than we can with the Greeks to teach us art": 1859 *Law Magazine*, Vol. VII, p. 383.

⁶⁶ The suggestion is made, for example, by such an eminent writer as Professor A. Dewar Gibb, *cit. supra*.

⁶⁷ Advocates of comparative law were Jas. Mitchell, *On Legal Studies*, 1862; and Lord Macmillan in an essay in the volume cited at p. 102; it is rather strange that little attention has been paid to a comparison of the laws of England and Scotland. Lord Kames, in his *Historical Law Tracts*, 1792, perhaps first suggested that this was a field ripe for study: it still is. "At the present time," writes R. H. Graveson in *Journal of Comparative Legislation*, 3rd Series, Vol. XXV, p. 54, "only a minute percentage of English lawyers have the slightest perception of the law of Scotland."

⁶⁸ The figures are entirely unofficial: no full official figures seem to be available. As C. J. Hamson comments in an article in 1953 *Journal of Society of Public Teachers of Law*, Vol. II, p. 19, "it is urgent that reliable statistics should be collected in the United Kingdom."

⁶⁹ C. de B. Murray, *cit. supra*.

cities. The table also reveals the curious fact that Glasgow solicitors have apparently throughout manifested a greater display of academic distinction than their Edinburgh counterparts. No explanation is ventured for this disturbing phenomenon. On the other hand Edinburgh offices have attracted in proportion more students for the LL.B., *per se* an honours degree,⁷⁰ and Edinburgh has a higher percentage of "other degrees" such as B.A., which seems to be a favourite with Writers to the Signet.

Table One

Year	Percentage of practising solicitors holding no degree	Percentage holding B.L.	Percentage holding LL.B.	Other degrees
GLASGOW:				
1929	67.2	12.6	16.9	3.3
1939	60.9	16.4	20.9	1.8
1949	54.0	21.6	23.8	.6
EDINBURGH:				
1929	81.7	4.5	9.6	4.2
1939	73.6	7.3	15.7	3.4
1949	69.2	11.4	16.9	2.5

As between the two bachelor degrees the following table shows how in Edinburgh University one year with another since 1918 the graduates have been almost equally distributed between the two degrees. In Glasgow on the other hand, as Table Three indicates and Table One would seem to confirm, the B.L. degree has been finding the greater favour.⁷¹ Edinburgh also caters for the occasional Ph.D. in law whilst Glasgow does not, or at any rate boasts none.

⁷⁰ As William Galbraith Miller reminded his generation, 1898 S.L.T.(News) 128. In evidence before the Royal Commission of 1876 Professor Macpherson said: "I believe the standard of attainments required to be higher than in the case of any other degree in the university": *Evidence*, Vol. I, p. 398.

⁷¹ In point of fact, although the LL.B. degree was established in 1862 the first degree to be granted at Glasgow was the B.L. in 1874. It was more than ten years before Mr. William Galbraith Miller succeeded in persuading that university to confer the LL.B. degree upon himself: *History of Glasgow University*, Jas. Coutts, p. 452. In a pamphlet he warned against the introduction of the junior degree and called it "a path of least resistance": *The Faculty of Law in Glasgow University*, 1889. Professor Lorimer endorsed his view.

Whilst it does not follow that because in 1874 the introduction of a new degree course apparently stimulated degree-taking, the same thing would happen today, yet it is thought that for other reasons some rearrangement and specialisation applied to the legal curriculum might attract and cater for a greater number than at present avail themselves of a law degree. It will certainly be interesting to observe the effect of the introduction of the recently announced research degree on the yearly figures for the LL.B. and B.L. degrees, and for this purpose the profession should be furnished with the full statistics which as regards the past are nowhere available in accessible published form.

The satisfactory⁷⁴ upward trend of graduate lawyers revealed by these tables leads one to ask the question whether the taking of a degree might shortly become compulsory for legal practitioners, and whether this would be desirable. A compulsory degree was seriously advocated for the English legal profession by Professor Gower,⁷⁵ and is also dealt with, though he wanted other accomplishments in addition, by Mr. Rupert Cross in an article already cited,⁷⁶ where he examines the arguments for and against. Mr. Cross's principal fear is lest a compulsory degree should place the profession's control in the hands of the universities rather than in the hands of the profession itself, and on the other hand cause them to render too vocational a training. Experience

⁷⁴ The 1934 Atkin Committee Report stated that it was desirable to have the maximum number of graduates, p. 6 (Cmd. 4663). In 1949 of the persons called to the Bar in England only 57 per cent. held degrees from English universities; of the solicitors admitted in that year only 36 per cent. held degrees, most of them being degrees in law: *UNESCO Report: Teaching of the Social Sciences in the United Kingdom*, 1953, p. 103. According to Professor John Boyd 95 per cent. of the candidates for admission as solicitors in Scotland in 1953 held law degrees: *Scotsman*, June 19, 1954. The trend towards a graduate profession is very clearly marked in Scotland.

⁷⁵ 1946 *Modern Law Review*, Vol. VI, p. 211, advocates the compulsory degree together with a further qualifying examination to admit to practice; earlier advocates were J. W. Budd and Mr. Munby in *Law Times*, Vol. CIX, p. 561. In China apparently a degree itself admitted to practice: 1938 S.L.T.(News) 16. In 1950 *Journal of Society of Public Teachers of Law*, Vol. I, p. 333, A. L. Goodhart wrote: "I believe that it is in the public interest that lawyers should be trained in part at least at the university." As regards Scotland, see *Journal of Jurisprudence*, Vol. XXVIII, p. 598 and 1926 S.L.T.(News) 29.

⁷⁶ XXI *Universities Review*, p. 16.

in Scotland seems to be that while the great majority of applicants for practising certificates now hold university degrees, the control of the profession is not materially impaired.⁷⁷ Doubtless, however, to make the degree alone an absolute and essential pass to practice would increase pressure upon the universities to cater even more for the practitioner and further to neglect the academic aspect of legal training and might place more control in their hands. With the law faculties the Cinderellas⁷⁸ of the Scottish universities, as they are at present, this might at least lead to a greater stirring of interest in university courts. But perhaps in view of recent developments noted elsewhere in this article it will not be necessary to resort to such drastic measures. Meantime it is better to be content with the present high percentage of graduate lawyers rather than try to legislate upon a matter which many rightly consider to have now only slight bearing upon the public interest. Nevertheless it is thought that the last has not been heard of the suggestion. As Professor Gower comments, "all organisations are feeling their way to making a degree compulsory."⁷⁹

A matter which has made its appearance from time to time in Scottish periodical literature is the question of the

⁷⁷ Professor Lorimer, criticising the graduate output of the Scottish universities in 1880 as "scandalously low," computed that in that year 90 per cent. of our lawyers went into practice without a degree: "One half of them at least ought, in my opinion," he wrote, "to have been graduates." But he sounds a note of warning too: "Degrees, like other presumptions, wear out if they are not followed by proof": *Journal of Jurisprudence*, Vol. XXIV, p. 617.

⁷⁸ "There is no popular contagion in scholastic sentiments": Walter Bagehot, "Bad Lawyers or Good?" 1870 *Fortnightly Review*, Vol. VII, p. 685. "The law faculty makes little noise in the newspapers. It has no charm for the man in the street. And thus it escapes the too generous heat which radiates from the injudicious benefactor and which is apt to bring up a plentiful crop of the most curious and noxious growths": An Introductory Lecture, J. H. Millar, 1902. So there are compensations.

⁷⁹ 1946 *Modern Law Review*, Vol. VI, p. 211. In this article Gower forecasts some rather alarming reforms for the English legal profession, including a compulsory three years at university. And in *Medico-legal Journal*, Vol. XV, Pt. 2, R. H. Graveson comments: "Once the value of a university degree is admitted it is a short step to making it a necessary qualification for practice." To this strong case he admits there is a strong answer, that "an academic training was never intended for conscripts."

provision of a higher research degree.⁸⁰ There can be no doubt that an injustice was felt to have been done to the legal profession in Scotland by the restriction of the LL.D. degree to purely *honoris causa* work, which was confirmed and continued by successive Royal Commissions. An article of 1930 with the arresting title "Stands Scots law where it stood?"⁸¹ roundly attributed the decline in legal scholarship to "the prostitution of a famous academic distinction" and suggested that the degree should be thrown open to legal merit like the D.C.L. of Oxford which is both honorary and competitive. A further suggestion was that the ancient degree be reinstated and made compulsory for the holders of the higher offices of State requiring legal training.⁸² This suggestion recalls William Galbraith Miller's sevenfold classification of those who either receive or regret the want of a legal training. In an article of 1889 he lists advocates, conveyancers, Members of Parliament,⁸³ diplomatists, certain civil servants, literary men who treat of political subjects, and scientific lawyers as being in this

⁸⁰ This grievance was considered by the 1830-76 and 1889 Commissions and all agreed to continue "the inveterate use" of the LL.D. as a mark of honourable distinction not confined to the sphere of law. Apropos of the indiscriminate bestowal of the degree W. G. Miller wrote: "Imagine the feelings of the Faculty of Divinity if every man who went regularly to church was qualified for a D.D.": *Journal of Jurisprudence*, Vol. XXVI, p. 260.

⁸¹ 1930 S.L.T.(News) 137.

⁸² This proposal has been advanced in many quarters. For example, Professor Lorimer and Professor Aytoun petitioned the Foreign Office to allow the LL.B. to exempt from the diplomatic examinations: *Journal of Jurisprudence*, Vol. IX, p. 346. They met with no success. Lorimer's proposal before the 1876 Commission was for "bifurcating the degree" and allowing it to be taken either professionally or in a more general way: *Evidence*, Vol. II, p. 364. He had written of his hope for the legal education of "the civil hierarchy, domestic, foreign and colonial" in 1863 *Law Magazine*, Vol. XVI, p. 319. A similar suggestion advocating a special department of the Law Faculty for the training of those not proceeding to practice was made by J. Dove Wilson in *Journal of Jurisprudence*, Vol. XXV, p. 169, and also in Vol. IX, p. 346. The B.L. degree was particularly instituted to cater for students destined for administrative posts, but it has now become firmly established as a professional qualification. There are no reliable statistics to show what proportion of law graduates proceed to posts outwith the legal profession, but it is thought to be small though increasing.

⁸³ It has often been contended that those who make the laws ought to have a legal training: 1830 *Law Chronicle* (Edin.), Vol. III, p. 363. "How unbecoming must it appear in a member of the legislature to vote for a new law who is utterly ignorant of the old": Stephen's *Commentaries*, 7th ed., p. 4.

class.⁸⁴ The list would require some modification at the present day, but undoubtedly there are many others besides practising lawyers who would benefit from a legal education. It is a question whether within the framework of the law faculties some specialised training might not be given to candidates for at least some of these classes. It has been observed, for example, that greater attention should be given to the large body of persons employed as "municipal lawyers"⁸⁵ in the service of local authorities and other public bodies. Many of them do hold law degrees, but they are forming associations of their own and may in time attempt to establish a kind of sub-profession. The legal profession is said to be notably fissiparous, and this tendency is one to be deplored.⁸⁶ As a Privy Councillor recently remarked, "a thorough university training LL.B. plus practical experience in a lawyer's office is a valuable asset and indeed is a fitting groundwork and training for any business or profession in life."⁸⁷

Something of this sort has already been attempted, at a lower level, in Edinburgh University, where since 1942 some ninety graduates, mostly with an eye to local government work, have received the newly instituted post-graduate Diploma in Administrative Law. By comparison only fifteen Ph.D. candidates have graduated in law in the whole thirty-five years covered by the tables printed on page 55. Clearly there is scope for some kind of action which will stimulate higher legal education in Scotland, and also which will open the benefits of a legal training to many who are not concerned with actual practice. No doubt with these criticisms and requirements in mind the four Scottish universities have recently promulgated General Ordinances instituting a new degree of LL.D recognising original work in the academic

⁸⁴ *The Faculty of Law in Glasgow University*, 1889, W. G. Miller; see also J. N. Higgins in 1860 *Law Review*, Vol. IX, p. 392.

⁸⁵ Perhaps 500 out of the 3,400 solicitors in Scotland: Appendix to *The Scottish Law Gazette*, Vol. XXII, No. 3, p. 17.

⁸⁶ "Outline of Legal Education": G. R. Y. Radcliffe in 1937 *Year Book of Education*.

⁸⁷ Rt. Hon. James Caldwell, *Scottish Law Gazette*, Vol. XVII, p. 94.

study of law as a philosophical discipline and a science, and it is to be hoped that this in itself will provide a new incentive to legal scholarship. As one English writer has observed, in the universities education has regularly trodden on the heels of research for research by teachers invariably produces textbooks in which a subject is scientifically exhibited in a manner most calculated to promote study. There is the chance that the new degree may provide scope for fulfilment of the obligation which many have felt to rest upon those who make an academic study of law to do something "to push forward the frontiers of knowledge."⁸⁸ That it is the universities themselves who are taking the lead (the first significant alteration of the Scottish Ordinances regulating legal studies since 1911) is a matter of great interest, and indicates that the profession⁸⁹ may yet look to the universities for a renewed concern for the future of Scottish legal education. Other factors which suggest that the mediocre history of Scots legal education may be taking a turn for the better are the recent institution in Glasgow University of a lectureship in the history of Scots law,⁹⁰ a subject which no other university save Aberdeen boasts; the comparative studies⁹¹ at Aberdeen; and the move to broaden the basis of the junior degree. If these indications are followed up and if the profession, and especially the coming profession, responds, Scotland may again be enabled to contribute largely to the unity of Europe.⁹² Other countries, notably Germany,⁹³ are also experiencing a revival of interest in legal studies and research. It is essential that Scotland should take this tide at the flood. Perhaps

⁸⁸ "Function of a University Law School," XLIX *Harvard Law Review*, p. 1936.

⁸⁹ "It is not to the profession alone that legal education is important. The nation at large has also interests affected by the condition and hence by the education of the Bar": Philip Anstie Smith, *History of Education for the English Bar*, 1860, p. 200.

⁹⁰ Established 1951.

⁹¹ See UNESCO: *Report: The Teaching of the Social Sciences in the United Kingdom*, 1953, p. 133.

⁹² Professor E. C. S. Wade says the best contribution to the unity of the democratic world would be to encourage the study of the legal systems of other States: 1952 *Journal of Society of Public Teachers of Law*, Vol. I, p. 415.

⁹³ "German Legal Science Today," E. J. Cohn, *International and Comparative Law Quarterly*, 1952, Vol. II, p. 169.

then indeed we may see the day longed for by Professor Gower when legal education will "live."⁹⁴ Until that day comes we cannot expect that Scots law will even begin to fulfil the role assigned to it in Professor Ullman's prophecy.⁹⁵

ALISTAIR R. BROWNLIE.

⁹⁴ Gower, *cit. supra*.

⁹⁵ Quoted in 1940 *Juridical Review*, p. 30.

PARLIAMENTARY SUPREMACY AND THE LANGUAGE OF CONSTITUTIONAL LIMITATION

1

THE remarks of Lord Cooper in *MacCormick v. Lord Advocate*¹ about the “distinctively English principle” of unlimited Parliamentary sovereignty have lately rekindled a good deal of interest in the question, first of the status of the Union legislation of 1707, and more generally in the wider inquiry whether the dispute about the limits of Parliamentary authority is as simple, dead, and undebatable as it appears in the textbooks. In two recent articles in the *Juridical Review*² both the theory and the practice of “sovereignty” have been considered and the question has been raised whether there may be said to exist any form of legal restraint on the United Kingdom Parliament (whether or not such restraint be enforceable in a court of law). It has also been questioned whether the Treaty of Union may be considered in the light either of a contractual obligation between the two nations, or as part of the “fundamental law” of the United Kingdom.³ The force of the former contention is not, perhaps, entirely destroyed by a decision that Scotland and England do not at the present day constitute two nations.⁴ A conceptual parallel might be found in the idea of a “compact binding public morality” which was urged to attach to the “entrenched sections” of the South African Constitution⁵ between 1931 and the decision of 1952⁶ that these

¹ 1953 S.L.T. 255, at 262, 263.

² K. W. B. Middleton, “Sovereignty in Theory and Practice,” 64 *Jur.Rev.* 135, and “New Thoughts on the Union between England and Scotland,” 66 *Jur.Rev.* 37.

³ Cf. T. B. Smith, 69 L.Q.R. (1953) 512, 516, and a letter by him to the *Listener*, March 25, 1954 (p. 533).

⁴ As contended by Middleton, *op. cit.* (2), p. 55.

⁵ See e.g., H. J. May, *The South African Constitution* (Cape Town, 1949, p. 339n).

⁶ *Harris v. Dönges* [1952] 1 T.L.R. 1245.

provisions constituted an enforceable restraint upon Parliamentary action. The contention that there may be "fundamental law" governing the exercise of legislative authority in the United Kingdom, raises, however, wider and more disputable issues. Both the Petitioners and Lord Cooper in the Royal Title case, it will be remembered, referred to the South African example. It emphasised in the Lord President's words a "conflict between academic logic and political reality." Academic logic, as applied to the status of the legislative Acts of 1707, may be characteristically represented by a passage from Dicey's account of the difference between Parliamentary sovereignty and Federalism:—

"Should the Dentists' Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed. . . . The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution." ⁷

On not a few occasions, both the logical and the historical bases of the dogma as enunciated by Dicey have been disputed. Professor C. H. McIlwain's is an honourable name amongst those who have tilted against what may be termed an absolutist interpretation of the sovereignty doctrine.⁸ The late Sir John Salmond⁹ and Sir Ivor Jennings¹⁰ have broken lances in the same cause. Mr. Middleton's two articles develop a number of arguments

⁷ *Law of the Constitution*, 9th ed., p. 145.

⁸ See "A Fragment on Sovereignty," "Whig Sovereignty and Real Sovereignty," and a number of other articles reprinted in Professor McIlwain's, *Constitutionalism and the Changing World* (1939) and *Constitutionalism Ancient and Modern* (1947).

⁹ *Jurisprudence* (Appendix on Sovereignty).

¹⁰ *The Law and the Constitution* (4th ed., Chap. IV), *Constitutional Laws of the Commonwealth* (1952) pp. 123-4.

advanced by these and others.¹¹ The arguments fall, broadly speaking, into two categories. One set of arguments is developed from a study of the historical and constitutional status of Parliament as a legislative body. The other category is more theoretical, and rests upon the analysis of such terms as "law," "authority," "state," "absolute," "limitation."

Dicey used both types of argument, and his management of them illustrates the difficulty of combining the two kinds of discourse. In considering the question of an attempt by Parliament to limit its legislative authority, he said :—

"The logical reason . . . is that a sovereign power cannot, whilst retaining its sovereign character, restrict its own powers by any particular enactment. . . . Every attempt to tie the hands of such a body *necessarily breaks down on the logical and practical impossibility* of combining absolute legislative authority with restrictions on that authority which, if valid, would make it cease to be absolute. . . . Limited sovereignty, in short, is, in the case of a Parliamentary, as of every other sovereign, *a contradiction in terms.*"¹²

No empirical reasons are advanced here. The statement is merely analytic. On the other hand, analytic and empirical elements are oddly mingled in the transition from this method of argument to the statement "That Parliaments have more than once intended and endeavoured

¹¹ An interesting article was written in 1933 by H. ver Loren van Themaat (XV *Journal of Comparative Legislation*, p. 47), in which it was argued that, "There are rules defining and restricting the authority of the British Parliament" but that "they cannot be enforced in the courts; they are *leges imperfectae*."

See also the two recent and important articles by Professor D. V. Cowen (15 M.L.R. 282, and 16 M.L.R. 273) entitled "Legislature and Judiciary."

That the "full legal implications" of Kelsen's Theory of Law have never been worked out in relation to the British Constitution and those derived from it, was argued in "Sovereignty and the Law," by Professor B. Z. Beinart of the University of Cape Town (*Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1952), 101, 103). I am indebted to Professor D. M. Walker for drawing my attention to this article.

¹² *Introduction to the Study of the Law of the Constitution* (9th ed., p. 68n.) (italics inserted).

to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure.”¹³ There cannot, however, be either attempts or failures to overcome logical impossibilities. Nevertheless, the doctrine of sovereignty has sometimes been stated as if the “limitation of sovereignty” were both a contradictory use of words, and a specially difficult task which might be attempted and had been attempted, but never with any success. Out of this comes confusion. That “there can happen no breach of covenant on the part of the Sovereign”¹⁴; that “the power of the ultimate imponent of law cannot be derived from or limited by law”¹⁵ are analytic, philosophical statements which are not in competition with, and cannot be refuted by, any parade of evidence about the facts of political life. The opposition which has been described between “sovereignty” and for example the development of public law and the enforcement of remedies against the Executive,¹⁶ is the result of investing the State as a legal entity with the personal characteristics of the philosopher’s sovereign.¹⁷

2

For the political philosopher, it is of course clear that law originates from and in one sense finds its source in

¹³ *Ibid.*, p. 65.

¹⁴ Hobbes, *Leviathan*, II, Chap. 18.

¹⁵ T. H. Green, *Lectures on the Principles of Political Obligation*, p. 106.

¹⁶ Cf. “The argument from welfare legislation has been held . . . to be fatal to the concept of Sovereignty.” (W. J. Rees, “The Theory of Sovereignty Re-Stated,” *Mind*, October, 1950, pp. 495, 517.)

¹⁷ The late Professor Laski was more concerned in his discussions of “sovereignty” with this kind of problem (the philosopher’s) rather than the jurist’s. Pollock thought him confused on the issue. (See *Pollock-Holmes Letters*, Vol. 2, p. 25). Cf. one of Laski’s letters to Holmes written in 1926:—“I don’t think myself that there is much difference between us on sovereignty, except differences of emphasis . . . I think myself that any State . . . should be responsible for the tortious acts of its agents. I don’t want the King in Parliament to be able easily to suspend Habeas Corpus; I want it to pay if its agents in the Admiralty invade a patent granted by the Board of Trade; I don’t want a man-of-war to be able to evade paying damages if its captain has handled it carelessly, and so on.” (*Holmes-Laski Letters*, 1916–35, Vol. 2, p. 832.) Compare, the motive force of Duguit’s attack on “sovereignty” in “Law and the Modern State” (Trans. Laski, 1921). Cf. J. D. B. Mitchell, “A General Theory of Public Contracts,” *LXIII Jur.Rev.* (1951) pp. 60 *et seq.*

political will. The political sovereign is "above" and "behind" the law. The ultimate forces which operate to change law are *legibus soluti*. The people can always think again. This formulation of the principle of "sovereign illimitability" is (in Coleridge's words) "but a puffing pompous way of stating a plain matter of fact."¹⁸

But there is in this country nothing which could be called a legal theory of the State. This is in some ways a disadvantage; in others a blessing. On the one hand the lawyer and political scientist are spared a certain amount of metaphysics. On the other hand our constitutional theory could in the result be compared with a somewhat uncomfortable garment whose fit is never quite certain, and whose exhibition must be accompanied by a continuous commentary on the differences between the cut of the cloth and the shape beneath—between formal theory and practical operation. So much is this the case that it is not always even clear what the formal theory is. Does sovereignty lie with the Queen in Parliament as an institution, or with the incumbents for the time being of the offices subsumed under that term? It may be that, "Queen Elizabeth II and the two Houses of Parliament are supreme law-makers, that is to say sovereign, but only because they are the reigning monarch for the time being, the existing holders of hereditary peerages, and the representatives of the Commons or electors."¹⁹ It may be that Parliament considered as an institution does not legislate.²⁰ On the other hand, it has been said in a recent Commonwealth case that:—

"Parliament . . . is an abstract concept. Its sovereign powers are exercised by human beings, but that does not make them individually or jointly sovereign: legislative powers were conferred upon Parliament, not upon them."²¹

¹⁸ *Of the Constitution of the Church and State* (1830), p. 108.

¹⁹ Middleton, *op. cit.* (2), p. 48.

²⁰ *Ibid.*, p. 54.

²¹ *Stuart and Nicol v. De Kock and Garner*, 1951 (3), S.A. 589 (A.D.) at 621, per Van den Heever J.A.

“Parliament” in this case, of course, was a body defined in the South Africa Act, but the definition²² makes no distinction between the persons constituting the legislative elements at any one time and those elements as institutions. The existence of a written constitution is then hardly sufficient in itself to support the conclusion that the dicta cited do not correctly describe the position in this country. The power of the courts to discriminate between the decisions, privileges and status of the persons constituting the legislative body, and the axiomatic obedience due to those persons organised and acting in a way judicially recognised as amounting to the operation of “Parliament” is a power of great constitutional significance (as recent experience in South Africa has shown) and its application elsewhere in the Commonwealth is as yet uncertain.

But in what sense may it be said that authority is “conferred” on Parliament in this country? Here again the formal theory (which is perhaps not quite sure of itself) encounters large reservations. What should one say is the status of the representative function of Parliament? Has the venerable fiction that law is enacted with the assent of the whole nation any fragment of constitutional significance? What formal conclusion about the nature of the delegation from People to King in Parliament may in any event be drawn from the many formulations of this principle? Law is “enacted . . . with the concurrent consent of the whole kingdom by their representatives in Parliament. So that it is morally impossible but that they are and must be calculated for the good of the people.”²³ Is the representative character of the legislators an extra-legal guarantee of the content of law? “Every Englishman is intended to be there present either in person or by procuration and attorneys . . . from the Prince, be he King or Queen to the

²² “The Legislative power in the Union shall be vested in the Parliament of the Union, which shall consist of the King, a Senate and a House of Assembly” (South Africa Act, 1909 (9 Edw. 7, c. 9), s. 19).

²³ Sir John Fortescue, *De Laudibus Legum Angliæ* (Chap. XVIII, “How Statutes are made in England,” p. 28, Trans. 1917).

lowest person of England.”²⁴ What force attaches to the statement that in theory the nation participates in legislation, when “the consent of the Parliament is taken to be every man’s consent,” and “the Parliament . . . representeth and hath the power of the whole realm, both the head and the body.”²⁵ Opposite conclusions about the extent of Parliament’s authority might well be drawn from the statement that its power is that of the whole realm. Is the exercise of power in any way conditioned by the fact of its representative nature, and the fact that “Parliament is in one sense just a piece of machinery for turning the inchoate will of the nation into a set of concrete rules?”²⁶ Could the “purpose for which Parliament exists”²⁷ ever be prayed in aid to assist in the answering of any question about the exercise of legislative power? Those who opposed the passage of the Septennial Act in 1716 clearly believed that it could. Archibald Hutcheson, attacking the Bill in the Commons, referred to the status of Parliament as possessing “full powers to consent to such laws as we shall judge for the benefit of the nation.” But, he considered, just as the “full powers” granted to an attorney contained the implicit reservation that they should not be used to overturn the basis on which they were granted, so the “full powers” of Parliament were subject to the exception that they could not be used to enlarge the authority delegated or to destroy the rights of the electorate.²⁸

²⁴ Sir Thomas Smith, *De Republica Anglorum* (ed. Alston, 1906), pp. 48-9.

²⁵ *Ibid.*

²⁶ Middleton, *op. cit.* (2), p. 48.

²⁷ Cf. *ibid.*, p. 52, “If the theory be accepted that Parliament, although sovereign, is only the vehicle by which the will of Queen, Lords and Commons, or in modern terms the nation, is translated into legislative practice, it seems impossible to imagine how Parliament could legally commit suicide. *For the effect would be . . . clearly contrary to the purpose for which Parliament exists.*”

²⁸ “No doubt what he (an attorney) shall do . . . shall bind me, but . . . it cannot be said that by the general words of doing all acts in my name, that he is entitled to add four years more to the continuation of his power.” (Parl. Hist. VII, 348.)

The paradox which emerges from the attempt to universalise the exercise of power by a representative brings out the force of Rousseau’s insistence that no man can represent another. A cannot (logically) be the representative of B and exercise *all* the powers of B, including the power of creating and regulating the conditions of representation.

But is the nation's delegation of legislative authority an act known to the law? Here again the inquirer into the nature of the British constitution is met with a shifting layer of "strict theory" quite apart from the distinction between the theory of the constitution and its political practice. "In theory" the courts know of the Queen and of the Queen's subjects. They know also of the Queen's will expressed in Parliament and exercised through her Prerogative by her servants. The enacting clause of a statute, if it preserves the fiction that the nation's assent is given to legislation, suggests essentially that the enactment of legal rules is an act of will. As a concession to the course of British history since 1689, the courts recognise (at perhaps a second level of theory) that this is not the Queen's personal will but a ceremonially authenticated artifact. Their judicial allegiance is to a Trinity. "We sit here," said Willes J. in 1871, "as servants of the Queen and the legislature."²⁹ But although judges are presumed to be acquainted with or entitled to inform themselves of the common facts of public life and of the course of history, judicial notice does not extend to the existence of the electorate, the People or the Nation³⁰—at least as contributing in any way to the efficacy of law. "The electors," wrote Sir Frederick Pollock, "are not legislators or anything like legislators. They have not the power of issuing any legal commands at all. An identical resolution passed by the electors of every constituency in England . . . would certainly have no legal force whatsoever . . . and no court of justice would be entitled (much less bound) to pay any

²⁹ *Lee v. Bude and Torrington Jnct. Ry.* (1871) L.R. 6 C.P. 576 at 582.

³⁰ Although they apply statutes which provide for "Representation of the People," and for "National" Insurance, Health Services, etc. Both the adjectives "national" and "public" might be used to raise awkward points of constitutional ontology. Maitland long since complained that "We are compelled to introduce into our legal thinking a person whose personality our law does not formally or explicitly recognise. We cannot get along without the State, or the Nation, or the Commonwealth . . . and yet that is what we are professing to do." ("The Crown as Corporation," *Collected Papers*, III, 244, 253.)

Cf. D. M. Walker, "The Legal Theory of the State," 65 *Jur.Rev.* (1953), 255.

attention to it."⁵¹ For, "the right of voting for the election of one who is to possess a share of the sovereignty is itself no more a share of the sovereignty than the right of publishing a political treatise or a political newspaper."⁵² There is, from the constitutional point of view, nothing, as Lord Bryce was wont to say, "beyond or behind" Parliament. Here the gaze of the law stops short.⁵³

3

It seems unlikely that the doctrine of Parliamentary sovereignty will in the foreseeable future be directly modified by the abandonment of this principle. Nevertheless, when an attempt is made to analyse the theory which has been erected on the basis of the Parliamentary supremacy expounded by Dicey, two points may be made:— (1) A body which promulgates authoritative rules takes certain actions, and it takes them in certain ways; but *structure* and *action* are not always simply and easily distinguishable. (2) Partly in consequence of this, there is something unsatisfactory about the language in which the differences between the British constitution and other constitutional systems are described. One fairly obvious opening for any analysis of the doctrine of legal supremacy is to ask about the status of the principle itself. One is here compelled to conclude with Middleton that "there is at least one fundamental rule of British constitutional law, namely, a rule conferring on the Queen in Parliament the right to make laws which must be obeyed."⁵⁴ But the enunciation of this "basic norm" leaves much unsaid. In particular the admission that the authority of the legislative mechanism

⁵¹ *A First Book of Jurisprudence*, 5th ed., p. 274.

⁵² Sir George Cornewall Lewis, *Remarks on the Use and Abuse of Some Political Terms* (1832), p. 43. Cited by Pollock, *ibid.* If it can truly be said that the members of Parliament are not themselves either individually or collectively sovereign (see the dictum cited above, note 21), then the notional link between electors and sovereign is lengthened. The vote becomes the right to help in the election of one who will exercise a function rather than wield a share of something as a right vested in himself.

⁵³ Cf. Bryce's *Studies in History and Jurisprudence*, Vol. I, p. 248.

⁵⁴ Middleton, *op. cit.* (2), p. 47.

may be used to remould and redefine its own *structure* leads the way to paradox about its *action*; leads the way to disagreement about the possibility of "self limitation"³⁵; and leads the way to the possible admission that the attempt to erect an immovable barrier between a "fundamental law approach" to legislative authority on the one hand, and a "sovereignty approach" on the other, is a task which is becoming increasingly difficult to carry through in the face of the constitutional facts of life outside the United Kingdom. The neat classification of constitutions into "flexible" and "rigid" originated by Bryce, and the cataloguing of "judicial review" and "legislative sovereignty" in the second and first of these pigeon-holes respectively, is a process whose pleasing symmetry is not what it was when Lord Birkenhead formulated the proposition that if a constitution were flexible or "uncontrolled," ". . . In the eye of the law the legislative document or documents which *defined* it occupied precisely the same position as a Dog Act, or any other Act, however humble its subject-matter."³⁶ A combination of the reasoning accepted by the High Court of Australia and the Privy Council in *Trethowan's* case³⁷ and of that recently advanced by the Supreme Court of South Africa³⁸ suggests the conclusion that few if any constitutional systems in the Commonwealth are "uncontrolled" in the absolute and irrevocable sense contended for by some exponents of the theory of Parliamentary supremacy and that judicial enforcement of

³⁵ Cf. Jennings, "The 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself" (*The Law and the Constitution*, p. 143).

³⁶ *McCawley v. The King* [1920] A.C. 691, at pp. 704, 709 (italics inserted).

³⁷ *Att.-Gen. for New South Wales v. Trethowan* (1931) 44 C.L.R. 394 and [1932] A.C. 526.

³⁸ *Harris v. Dönges* [1952] 1 T.L.R. 1245, and *Minister of the Interior v. Harris*, 1952 (4) S.A. 769 (A.D.). Particularly significant is the statement that "One is doing no violence to language when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally," *per* Centlivres C.J. [1952] 1 T.L.R. 1245, at 1258, *i.e.*, the unicameral two-thirds majority procedure, specified by the constitution as a "guarantee" of certain political rights, is not to be regarded as a "fetter" on Parliament, but as part of the meaning of "Parliament." Cf. Cowen, "Legislature and Judiciary," 15 M.L.R. 282, and 16 M.L.R. 273, and Marshall, "What is Parliament?" (*Political Studies*, Vol. 2, No. 3, 1954).

constitutional provisions as against the legislators' self-declared "sovereign" privilege is a process not incompatible with Parliamentary sovereignty.

Now these conclusions, although welcome to those who have opposed the idea of "absolutist" sovereignty, stem from a rather different set of recommendations for the use of the word "sovereign" from that which such opposition may imply. The point was, for example, persuasively made by Middleton that:—

"The root of the problem lies in a failure to distinguish between two totally different conceptions, subjection to law, and subjection to human control. A sovereign, that is one who possesses supreme political authority . . . cannot become subject to the control of any other person, or persons, without losing his supremacy. But he may be subject to law. There is nothing anomalous in Parliament, although not controlled by the electorate in a legal sense, being under legal obligations towards the electorate."³⁹

The failure to distinguish between "subjection" to persons or bodies and "subjection" to rules has certainly been the source of some linguistic muddles about "supremacy" and "limitation." But it is not, I think, a central feature of the argument about sovereignty that it should end in confusion and misunderstanding about this point. Many proponents of opposed views have been quite clear about the difference. The core of the discussion is found in unpacking the expression "legal limitation" itself. An example of the difficulties inherent in the concept is provided by the recent controversy amongst constitutional lawyers in France as to the effect of the acceptance of the treaty obligations proposed by the European Defence Community Agreement (a controversy now stilled if not settled).

³⁹ Middleton, *op. cit.* (2), p. 50n., and *op. cit.* (1), *passim*. If "freedom from legal limitation cannot be the test of sovereignty" (*op. cit.* (2), p. 50n.), it would seem to follow that no legal restraints, however onerous, on a legislative organ will prevent it from qualifying for the label "sovereign" provided only that they are self-imposed and do not subject it to external influence.

By some, ratification was regarded as amounting merely to the acceptance of obligations similar in kind to those involved in any treaty by which a State agrees to limit its freedom of action.⁴⁰ By others the Treaty was regarded as subordinating the sovereign authority in France to an external legislator.

“Le ‘Traité de Paris’ ne pose pas simplement des règles de droit que le législateur français devrait respecter : il institue un pouvoir législatif supranational dont le législateur français ne fait point partie. . . . C’est une tout autre chose ; plus qu’une délégation, un véritable transfert du pouvoir législatif.”⁴¹

It is the transference of legislative authority and the transformation of the elements by which it is exercised which raise most difficulties for the traditional theory of sovereignty. A redefinition of legislative authority by an existing set of elements (which is the most general way of describing what has been alternatively called a “transfer” or “partial abdication” of authority)⁴² raises in an acute form the problem of legal control or “limitation.” It poses the question considered in a particular form in *Harris v. Dönges* as to when a legal provision may be considered as a *fetter* on legislative action and when it *defines* such action. This method of approach is relatively novel for courts operating with the traditional concepts of British jurisprudence. Unfortunately these concepts have saddled the legal mind with a set of “essentialist” questions about the “nature” of sovereign “bodies.” It has been asked whether a sovereign can “bind” himself or his successors, and the answer has been infected by the emotive implications of a particular theory of law. Law as command, and law as the exercise of will (personal or collective), combine to suggest that sovereign law-givers “cannot be bound.”

⁴⁰ M. André Philip, *Le Monde*, June 4, 1954.

⁴¹ *Le Monde*, June 2, 1954 (from a symposium of views).

⁴² Cf. Cowen, 16 M.L.R. 273, pp. 291 *et seq.*

A person cannot in any normal sense be said to order himself about. Nor can he be prevented from changing his mind.⁴³ There have thus existed powerful analogical reasons for concluding that a sovereign legislative body is prohibited from placing restrictions on future legislative action. This of course is a paradox, which is underlined by the fact that the principle of Parliamentary inability to bind its successors appears in the textbooks both as an example of the omnipotence of the sovereign and as the sole exception to or "limitation" upon the extent of the principle.⁴⁴ A related suggestion which may be advanced in explanation of an inability to bind future legislators is that "the law which gives a Parliament its powers confines those powers to the lifetime of that Parliament."⁴⁵ But it is not clear whence such an inference may be drawn. Nor is it clear what exactly could be meant by the statement. "All laws, all political institutions," are, as Jeremy Bentham observed, "essentially dispositions for the future."⁴⁶ In an obvious sense every Parliament projects its authority beyond its own lifetime. But there is a more vital point to be made here, and one which touches the nerve of the present dispute. Future legislators may be bound in a more profound sense by the use of legislative authority to

⁴³ Cf. Dicey's remark that "no man can, while he lives, give up, do what he will, his freedom of volition" (*Law of the Constitution*, p. 68n.). Middleton (*op. cit.* (2), p. 51n.) cites Austin's statement that "we cannot speak of a law set by a man to himself," and suggests that "King, Lords and Commons . . . are no more capable of binding themselves than an individual can prohibit himself from changing his mind." This type of argument, of course, gains force if it is conceded that sovereignty is vested in the human incumbents of the legislative offices.

⁴⁴ There is a mixed set of considerations to be disentangled in contrasting *Parliament* with *its successors*. One is the distinction (whatever it is) between the office held and the holders of the office. The other is the issue as to whether there is a series of entities through time or a continuing entity. This is complicated by the effect of changes in the formal structure and the question of how such changes are to be described. The statement that Parliamentary omnipotence is illustrated by the proposition that no Parliament can bind subsequent Parliaments (which is an odd way to illustrate omnipotence!) must envisage two sets of persons or entities. What is a limitation looking forward is (limited) omnipotence looking back. Statements about Parliament's inability to bind *itself* seem to envisage a continuing abstract entity and are backed by statements about *its* will, and changing *its* mind.

⁴⁵ Middleton, *op. cit.* (2), p. 51.

⁴⁶ *The Book of Fallacies* (Works. Ed. Bowring, Vol. II, p. 407).

define and redefine the legislative process. In the light of recent developments it can hardly be maintained that the use of this power in certain ways (for example to provide for referenda or special-majority modes of legislating) is "a highly improbable notion"⁴⁷ in its application to the British Parliament, though it may well be that legislation of such a character is not at the moment politically foreseeable in the United Kingdom. The arguments against its validity have always been "essentialist" arguments based on the likening of the legislative process to the exercise of will by the political philosopher's "sovereign" (whose role has been taken in British constitutional theory by the King's command, fashioned and authenticated in Parliament). These arguments lose much of their force when a different mode of analysis is adopted. The "theory and practice" of sovereignty promise to take on new faces as the result partly of the effect of new constitutional experiments and legislative forms,⁴⁸ and partly as the result of the impact on legal theory of the attempts made in recent years to clarify what Professor Hart has called "that whole style of human thought and discourse which is concerned with . . . the language involved in the enunciation and application of rules . . . of (which) the law is one very complex example."⁴⁹ There is no particular reason why the rules applied by the courts to ascertain the validity of claims to have exercised legislative authority⁵⁰ should be

⁴⁷ Middleton, *op. cit.* (2), p. 51n.

⁴⁸ It is noteworthy that some hesitation has been apparent as to the use of the term "sovereign" in relation to the constitutions of India, Pakistan and Ceylon. Cf. K. C. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., pp. 336-7. Sir Ivor Jennings in his *Constitution of Ceylon* (1949), p. 56, concedes that the necessity of a two-thirds majority, certified by the Speaker for certain legislation, may be described as a rule for the manner in which authority is exercised rather than a limitation on the scope of authority. Nevertheless his opinion seems to be that on this account the legislature is not properly describable as "sovereign."

⁴⁹ "Definition and Theory in Jurisprudence," 70 L.Q.R. 37, pp. 41, 60.

⁵⁰ It is in this shape that the courts in South Africa have described their task rather than as a "testing right" over legislation—thus endorsing the statement made in *Ndobe's Case* [1930] A.D. 484, 496, that whilst certain matters of legislative procedure are within the area of Parliamentary privilege, it is always open to the courts to inquire whether the elements constituting Parliament have

conditioned or determined by the metaphors, metaphysics, or methods of a philosophical theory about the nature of law whose main conclusions have been rejected. The question is of course a difficult one. The distinction between legitimate provisions defining the manner and form of future legislative action and attempts to trench into the area of policy open for future legislative action is in some conceivable cases impossible to make except *ad hoc* and by instinct. An instance has been provided by Professor Friedmann :—

“Suppose that an exuberant Parliament exploits an overwhelming majority in both Houses to pass an Act that no change in the existing powers and structures of the Upper House shall be made unless eighty per cent. of all voters agree in a referendum to such an alteration. It would be safe to say that such a provision would make any constitutional alteration of the functions of the Upper House virtually impossible.”⁵¹

Friedmann suggests that the judicial test applied to the question when an amendment of the legislative process amounts to a “fettering of essential functions of legal change”⁵² should be similar to the “pith and substance,” “real purpose,” “main effect” formulae which have been applied to statutes by courts in the Commonwealth of Australia and by the Privy Council.

Much could be written about the implications and difficulties of such proposals. Mention of them is sufficient however to show that the questions which may be raised by future attempts to formalise political guarantees as modifications of the *structure* of legislative bodies can hardly be

functioned in the way necessary to the passing of a valid Act of Parliament. Cf. the formulation of Dixon J. in *Trethowan's* case (as to the effect of introducing a referendum procedure into the legislative process in the United Kingdom). If the provision were to be subsequently ignored “the courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside” (1931) 44 C.L.R. 394, at 426.

⁵¹ “*Trethowan's Case*, Parliamentary Sovereignty, and the Limits of Legal Change,” 24 *Australian Law Journal* (1950), 103, at p. 105.

⁵² *Ibid.*, p. 107.

dismissed by simple reference to "the principle of sovereignty." The specifically British (and, in a sense, anomalous) inclination towards leaving the rule of law in constitutional matters to be protected by anyone rather than by courts of law, is a policy which is not perpetually self-guaranteeing at all times and places. Whilst Bills of Rights are fair game for those who combine belief in the superior Benthamite virtues of Parliamentary government and possible misgovernment, with a liking for confining judges to issues of a kind which a draftsman may define with some precision in a statute, it is worth pointing out that the limitation of legislators by law and the principle of Parliamentary sovereignty do not name competing and incompatible solutions to a common problem. In its use by philosophers and legal theorists the "principle of sovereignty" is empty of content (it enunciates the undeniable truth that the basic rule of any legal system is the basic rule). In itself the principle says nothing about the elements through which legislative authority is exercised. Here it has been misleadingly supplied with content. From the traditional non-empirical propositions that sovereign power is "perpetual, illimitable, and indivisible" empirical conclusions have been deduced about the forms of legislative action. Yet despite the spell-binding effect of the terms "illimitable" and "indivisible" the most striking feature about the exercise of "sovereign" power is its apportionment, division, and definition. What Austin called the "sovereign body in its collegiate and collective capacity"⁵³ may today be observed taking on different shapes, following differing, and sometimes extremely complicated procedures for different classes of legislative action. And if a sovereign may be defined in operation by enumerating the rules which must be followed before its action can be said to have taken place the resulting picture is very different from the traditional

⁵³ *The Province of Jurisprudence Determined* (ed. H. L. A. Hart, 1954), pp. 253 *et seq.*

“essentialist” panorama. A common pattern of constitutional principle can be perceived linking the exercise of legislative authority in what we have learned to call “flexible” “rigid”; “formal” “informal”; “controlled” “uncontrolled” (even “federal” and “unitary”) systems. The rules⁵⁴ may differ considerably in content and complexity. (Compare for example the ways in which authority may be exercised in Great Britain, Canada, South Africa, Australia and the United States.) Yet these rules betray a common element, which is a fact about their status and function rather than about their content. This may be conveyed in a phrase as the “notion of authenticated procedure.” There is inherent in the idea of “procedure” that of “limitation”—not in the sense of “bound” or “restricted,” but of “duly constituted” action.

None of this is to say that the differences which have been marked by the terms “sovereign,” “rigid,” “uncontrolled,” “unitary,” etc., are not differences, or that these words may not provide useful classificatory labels. But the exposition and the evolution of the constitution are delicately interlinked. It is easy to mistake the logical function of labels. Labels do not contain in themselves the answers to any legal or constitutional question, and to treat them as if they did may be both a logical abuse and a dangerous political practice.

G. MARSHALL.

⁵⁴ It is not merely that a rule (whether formally drawn up and certified as “constitutional” or not) “binds” in a different sense from that in which physical force or external pressure “binds.” A legal rule or prohibition may be psychologically felt as exerting moral pressure on one who recognises its validity. But it is also the case that a rule defining action “binds” action taken under it in a way for which the alternative “fetter” is inappropriate. The rule states what is to count as the “action” in question.

SOME ASPECTS OF THE SOCIAL AND ETHICAL ELEMENT IN ANALYTICAL JURISPRUDENCE

IT is not often sufficiently realised that the extreme nineteenth-century trend towards abstraction in Analytical Jurisprudence failed not only in its attempt to create a perfectly logical system of law, but also in its professed aim of separating law from social and ethical elements.¹ Indeed, the strict application of logical analysis, as understood by analytical jurists, was not an entirely unsuitable method of conveying a particular political or philosophical doctrine. This method has been used with equal success by a number of philosophers and lawyers. On the other hand the post-analytical reaction, with its emphasis upon a realistic, common-sense approach to jurisprudence, neglected the study of its theoretical aspects, lest abstract theory detracted some value from what was claimed to be an entirely pragmatic and factual undertaking.

It is proposed in this article to attempt two things. In the first place to show that neither in abstract theory nor in practice is it possible to separate law from social and ethical considerations. In this respect an attempt will be made to link Plato's theory of Ideas or Forms with the extreme trends in Analytical Jurisprudence, while at the same time bearing in mind the practical implications of this comparison which alone can justify the lawyer's brief excursions into

¹ Although this article is primarily concerned with Austin's occasional extremist tendencies, similar trends in England or on the Continent, like the *Begriffsjurisprudenz* of the German Pandektists for instance, are not excluded. On the other hand it is not suggested that Austin has been indifferent to social and ethical considerations. In fact he said: "With us, Jurisprudence is the science of what is essential to law, combined with the science of what it ought to be." *Lectures in Jurisprudence*, 4th ed., ii, p. 112. The common association of the term Analytical Jurisprudence with Austin's viewpoint is misleading. As Sir Carleton Allen has suggested, the term "The Imperative School" would be more appropriate; see *Legal Duties*, pp. 13-14. For a stimulating discussion of the place of Analytical Jurisprudence in contemporary legal thought, see Stone, *The Province and Function of Law*, Sidney 1950, Chap. I, pp. 3-43.

philosophy. Legal philosophy, because of its closer contact with abstract ideas, can often explain the excesses of the Analytical School much more effectively in terms which are not open to those who view every intellectual speculation with suspicion. Paton points out that "Ignorance of the contribution of the philosopher causes us to stumble when we might walk with reflected light—even if the rays are not very powerful, they are preferable to the darkness which else would be our lot."² Thus the modern jurist need not fear that a return to the study of legal philosophy may bring about a return of the cult of the abstract from which Jurisprudence has only recently emerged.

In the second place, the argument will be carried a stage further and it will be suggested that while Analytical Jurisprudence failed to achieve its explicit aims, it nevertheless became the carrier of an unconscious, but no less real, legal idealism, which can fairly be described as an intellectual or metaphysical natural law. This natural law was bound to be, in the last resort, of ethical significance and substance. But the means which Analytical Jurisprudence employed in order to arrive at its moral and political premisses were neither original nor modern.

Finally, one word of caution. It is the purpose of this article to reveal a method of approach and draw the necessary conclusions therefrom, not to attack Analytical Jurisprudence as such. Its shortcomings are already well known and Austin has often received more criticism than he has ever merited. The Analytical School, in the process of turning law into as exacting a science as was feasible, inevitably contributed its own natural law, but at least this natural law has proved to be of more permanent value.

² Paton, *A Textbook of Jurisprudence*, 1st ed., p. 106. It is significant that few lawyers have occupied themselves with philosophy. Conversely few philosophers have occupied themselves with legal problems, see Gény, *Méthode d'Interprétation*, vol. i, pp. 17 *et seq.* Cf. Leibnitz's view expressed in his thesis for the degree of Master of Philosophy in 1664—that "a study of the relations of philosophy and law will help to remove the contempt of the students of the latter for the former." *Great Jurists of the World*, 1913, Continental Legal History series, p. 287; also *ibid.*, at p. 293.

I. It is now generally agreed that the tendency towards rationalism which was so prominent a feature of nineteenth-century legal thought, may partly be attributed to the desire to obtain knowledge of the "true nature" of the legal order, a process of considerable difficulty in view of the chaotic state of English law at the time. "I will venture to affirm," wrote Austin, "that no other body of law, obtainable in a civilised community has so little consistency and symmetry as our own."³ It must be emphasised here that this desire, which was at the root of analytical thinking, was a value-judgment on the part of the jurists based upon an appreciation of the social realities of the period. It had, however, no esoteric or metaphysical quality and was arbitrary in the sense that its acceptance depended on choice rather than logical compulsion. Two factors that must have influenced this desire towards knowledge through logical analysis may be inferred. In the first place, there was the difficulty of coping with "the enormous bulk (of) details that make(s) up the mess" of English law, as Austin wrote,⁴ which defied classification and invited logically unpleasant comparisons between the English law of that period on the one hand, and both the Roman law of the German Pandektists and the French Civil Code on the other.⁵ In the second place, there was a belief in the absoluteness of the ethical standards of the period amounting to a claim of "self-evidence," a belief which naturally led analytical jurists to the conclusion that all other social and ethical theories were as relative as they were superfluous, and could only bring confusion into the legal order.⁶

The analysts' quest for knowledge of the "real" legal

³ Austin, *loc. cit.* p. 483; note the implications of the proposition: consistency and symmetry are to be sought for their own sake.

⁴ *Ibid.*

⁵ "... the knowledge of an English lawyer is nothing but a beggarly account of scraps and fragments. . . . Compare the best of our English treatises with the writings of the Classical Jurists and of the Modern Civilians, and you will instantly admit that there is no exaggeration in what I have ventured to state." *ibid.*

⁶ The "self-evident" nature of the moral background of nineteenth-century Analytical Jurisprudence is dealt with *post* at pp. 95 *et seq.*

order, for the "enduring elements which recur endlessly,"⁷ may be put in another way. There is an ultimate legal reality or truth which will reveal itself to those jurists who are able to remove from a legal system all social and ethical elements. This ultimate legal reality would consist of a perfect pattern or structure of a pure legal system which would be self-contained and independent of non-legal premisses. Ethical and social considerations are termed "extra-legal" or "metajuristic" and are declared to be of no concern to the lawyer.⁸

It may be observed that this view of the "ultimate truth" has certain affinities with Plato's theory of Forms, affinities which enable us better to understand the abstract and artificial process of thought which is required, and which has been unconsciously followed by nineteenth-century analytical jurists, in order to achieve the desired separation and independence of the legal structure. We must, therefore, turn now to a brief summary of the Platonic Theory.⁹

Faced with the phenomenon of an ever-changing society, Plato was induced to agree with the Heraclitian doctrine that the world is in a "constant flux."¹⁰ In a world of constant change, however, it is impossible to obtain real

⁷ "It is the mission of Analytical Jurisprudence to isolate from the great mass of available legal material the enduring elements which recur endlessly in concrete legal phenomena, and to analyse and arrange these elements into an abstract system of classification." A. Kocourek, *An Introduction to the Science of Law*, quoted in Hall's *Readings in Jurisprudence*, at p. 338, but see also *post*, p. 91 note 45.

⁸ There is an abundance of statements insisting upon a clear separation between law and ethics, e.g.: "The science of Jurisprudence (or simply and briefly Jurisprudence) is concerned with positive laws or with laws strictly so called, as considered without regard to their goodness or badness." Austin, *loc. cit.* p. 177. For a modern exclusion theory see Kelsen, *General Theory of Law and State*, H.U.P. 1949. "The pure theory of law insists upon a clear distinction between empirical law and transcendental justice, by excluding the latter from its specific concerns." Preface, p. xv. "It is by confining jurisprudence to a structural analysis of positive law that legal science is separated from philosophy of justice and sociology of law and that the purity of its method is attained." *Ibid.* Other modern scholars have not hesitated to include specifically "metajuristic" considerations in their view of legal theory. Thus, for instance, Lévy-Ullmann in his work *La définition du droit*, 1917, considers that the idea of liberty should form part of the definition of law; see esp. pp. 152-3, 156 and 165.

⁹ *Republic*, v, 473 *et seq.*; also *ibid.*, x, 595 *et seq.*

¹⁰ "You cannot step twice into the same river." See Diels, *Die Fragmente der Vorsokratiker*, 1951, vol. i, p. 171, No. 91.

knowledge. To counteract this pessimistic view, Plato contributed his Theory of Forms which is partly intellectual and partly metaphysical,¹¹ and which was designed to prove that the ideal world only is permanent and immutable.¹² The intellectual side, which is more important for our purposes, is as follows: When we attribute a certain quality to an object, as for example, when we call that object beautiful, we mean that we recognise in that object the characteristics of beauty; but the object is not Beauty itself. This quality may be present in many objects although the general Idea of Beauty is only one. The metaphysical side of the doctrine holds that there exists a perfect Idea or Form of Beauty and that this Form only is real,¹³ whereas every other physical manifestation is merely apparent.

It will be evident that Plato's theory of Forms implies, in the first place, that it is possible to think of an entity which is separate and independent of the quality which we recognise in a specific object¹⁴; it implies, that is to say, that there exists an independent structure of a concept, as, for example, when we accept that for the ϕ quality recognisable in many objects, there is one Φ Form. Secondly, having agreed that there are abstract entities or structures, we can attribute to these structures the various aesthetic and moral qualities which we recognise in the world. Thus, we may have the ideal Form of Beauty, the ideal Form of the Good, etc. A similar process of thought is required if we are to isolate legal rules from their social substance, a process which involves an extraordinary degree of abstraction and artificiality. The first stage was to emphasise the use of legal

¹¹ Bertrand Russell, *History of Western Philosophy*, at p. 143; it has been suggested to me that the term "epistemological" may be more appropriate than the term "intellectual."

¹² K. R. Popper, *The Open Society and its Enemies*, vol. i, 1945, pp. 16 *et seq.* where a critical account is to be found of the political implications of the Platonic Theory.

¹³ *Republic*, x, 597.

¹⁴ Mill said that "Mankind in all ages have had a strong propensity to conclude that wherever there is a name there must be a distinct separate entity corresponding to the name, and every complex idea which the mind has formed for itself by operating upon its conceptions of individual things was considered to have an outward objective reality answering to it." Quoted in Hall *op. cit.*, p. 262.

concepts which are the instruments of all legal systems.¹⁵ Analytical Jurisprudence, however, went far beyond the mere use of concepts; it tore them from their context and turned them into absolute form-values, knowledge of which could only be achieved by the strictest application of logical principles, without any reference to the needs of the society in which the particular concepts were designed to operate. Austin said that "By careful analysis of leading terms, law is detached from morals, and the attention of the student of Jurisprudence is confined to the distinctions and divisions which relate to law exclusively."¹⁶ He considered that "with regard to lawyers in particular . . . the study of the rationale of law is as well (or nearly as well) fitted as that of mathematics to exercise the mind to the process of deduction from given hypotheses."¹⁷ Thus the task of Plato's philosopher was similar to that of the analytical jurist in that absolute truth in each subject could only be reached by a purely intellectual process. It is in this respect that it may be claimed that Analytical Jurisprudence is, in effect, a legal version of Plato's theory of Forms.

How far did legal conceptualism succeed in keeping this abstract edifice of logic distinct from any social and ethical elements? It has already been suggested¹⁸ that the analytical case rested upon a value-judgment, namely, the desire to obtain knowledge of the "true" legal order by excluding social considerations, where these were explicit, and by insisting that all legal rules should be analysed by logic. It was argued that these operations would succeed in separating the legal structure from the substance of the law. It may be questioned, however, whether non-reference to social factors amounts to their successful exclusion from the law. Furthermore, this desire for knowledge was also an end. Austin stated that "everybody must admit that law *ought*

¹⁵ As regards the function of concepts in law see Du Pasquier, *Introduction à la théorie générale et à la philosophie du Droit*, 3rd ed. (1948), pp. 168-9 and note 2; also *ibid.*, pp. 175-6, Example xxix.

¹⁶ Austin, *loc. cit.*, ii, 1111.

¹⁷ *Ibid.*, at p. 1123.

¹⁸ *Supra*, p. 81.

to be known whatever we may think of the provisions of which it ought to consist.”¹⁹ Law in its nineteenth-century state was bulky, obscure and lacking in symmetry and order; it did not, therefore, lend itself to the uses for which it was intended. Consequently, it was a necessary implication of the analysts’ quest for knowledge that a clear structural legal system, in which jurists would know exactly where they stood, was desirable. This would presumably serve some still unspecified ends.²⁰ Desire for knowledge being both the basis and the end of analytical thinking, it would follow that all logical abstractions must operate within and be influenced by these limits. The social and ethical nature of these limits, however, would prevent any intermediate logical abstractions from being free from social and ethical elements.²¹

If we now consider the practical implications of this fundamental intellectual objection to the attempt of Analytical Jurisprudence to divorce itself from “extra-legal” considerations, we are struck by the fact that it is impossible to refer to legal rules without associating them with their practical aspects. Even an ideal and imaginary legal system would have to be attached to an ideal and imaginary society. However, it must first be emphasised that reference to the ethical and social substance of legal rules is no reference to their element of justice with which we are not here directly concerned.²² Ihering was one of the first scholars to attack

¹⁹ *Ibid.*, 1114.

²⁰ See *post*, part II, at pp. 95 *et seq.*

²¹ The impossibility of separating the “extra-legal” side of a legal rule from its “pure structure” has led to the criticism of Kelsen’s “pure science” on the ground that if the *Grundnorm* is impure all derivative norms must also be impure: see Stone *loc. cit.*, at p. 105: “We are invited to forget the illegitimacy of the ancestor in admiration of the pure blood of the progeny. Yet the genes are at work down to the lowliest progeny,” but *cf.* Professor Campbell’s criticism in 63 L.Q.R. 524. It is true that the “pure science” cannot claim purity in so far as future action is concerned. It can merely claim that the account of the stages of legal development given *ex post facto* is formal or factual; but a post-mortem account of the legal order is of doubtful usefulness. *Cf.* also Sir Carleton Allen, *Law in the Making*, 3rd ed., pp. 46–58.

²² The notion of Justice is beyond the scope of this article. It may be useful to state, however, that the distinction between law and justice has not been a matter of little difficulty. Thus Pollock stated that “The words ‘just’ and ‘justice’ and corresponding words in other tongues have never quite lost ethical significance even in the most technical context”: *A First Book of Jurisprudence*,

and ridicule the cult of the abstract, the *Begriffsjurisprudenz*, according to which law was considered not as a means to an end but as an end in itself.²³ More recently Pound had this to say about Analytical Jurisprudence: "Our analytical science of law in the last century did no more than cover up the actual process with dogmatic fictions that for a time made us blind to what we were doing and led to some unhappy attempts to reduce to rule things that do not admit of rule."²⁴ Again Ripert has stated that "la séparation absolue du droit et de la morale est impossible à réaliser"; he went on to condemn those jurists who "prenant le moyen pour la fin, nourrissent uniquement le droit des constructions juridiques."²⁵ Gény has demonstrated that the application of many legal rules frequently involves a clash with the logical consequences of other legal rules. The resulting rule is then based on choice rather than logic.²⁶ This would be the case, for

6th ed., pp. 32-3. Vinogradoff said: "Thus it is certain that law cannot be divorced from morality in so far as it clearly contains, as one of its elements, the notion of right to which the moral quality of justice corresponds": *Common Sense in Law*, 2nd ed. (by Professor Hanbury), p. 19. It may be that the linguistic accident in English Law of having two words "law" and "justice" made things easier for the analysts, but cf. "Courts of Justice" etc. The distinction is unfortunate; cf. *Δίκαιον*, jus, Recht, droit, diritto, derecho, etc. where the coincidence of the two meanings is not "a mere chance," Vinogradoff, *ibid.*, and pp. 18 *et seq.*, para 5; also *ibid.*, p. 45: "Such coincidences cannot be treated as mere chance, or as a perversion of language likely to obscure the real meaning of words." Also cf. Salmond *Jurisprudence*, 13th ed., pp. 8-9 and note (e). It is not here denied that ideally the concept of morality is wider than law, see Roubier, *Théorie Générale du Droit*, 2nd ed. (1951), pp. 40-51, para. 6. The term "social and ethical elements" is here employed as a neutral term indicating non-formal matter and is wide enough to include anti-social and unethical substance.

²³ The following quotation from his work *Scherz und Ernst in der Jurisprudenz—im Begriffshimmel—Ein Fantasiebild* is characteristic: "Here only pure science, legal logic reigns, and the reason why it reigns and shines with such brilliance is because it has no connection whatsoever with life."

²⁴ Roscoe Pound, *Law and Morals*, 2nd ed. (1926), at p. 56.

²⁵ Ripert, *La Règle Morale dans les Obligations Civiles*, 4th ed. (1949), pp. 23-4 para. 14.

²⁶ "Il peut arriver que, de deux principes, qui paraissent tous deux solidement établis, se déduisent des conséquences contradictoires. Il faudra bien choisir et faire céder la logique de l'un devant celle de l'autre." Also cf.:

"Il est clair que, si une conséquence, logiquement tirée du principe vient se heurter à une décision contraire de la loi, celle-ci doit prévaloir, sauf à voir si cet échec au principe ne serait pas de nature à compromettre le bien fondé du principe lui-même."

"Il advient que telle conséquence, fort logiquement extraite d'un principe, choque vivement le sentiment de l'équité que nous portons au dedans de nous, ou

example, in English law when a court chooses which of two conflicting decisions of the House of Lords it wishes to follow and purports to be bound by one of them. The court, in such a case, is compelled to choose between two or more contradictory consequences of two or more legal rules. The result is that the accepted consequence will appear as logical, whereas in effect it will be the result of the free choice that decided against the equally valid logical consequences of other competing legal rules. Logic then itself sometimes imposes the adoption of "extra-legal" considerations in the legal structure. Again, the legislator or judge occasionally distorts the logical consequences of a legal rule for some social purpose. A striking illustration of the way in which the courts deal with logical difficulties is afforded by some of the cases concerning the principle of the equality of sexes. Thus in *Winsmore v. Greenbank*,²⁷ it was held that the husband can recover damages for the enticement of his wife. It was not until 1923 in the case of *Gray v. Gee*²⁸ that the wife's right to sue under similar conditions was recognised. The principle of the equality of sexes was not accepted, however, in the more recent decision in *Best v. Samuel Fox Ltd.*²⁹ It will be remembered that in this case the House of Lords affirmed the unanimous decision of the Court of Appeal to the effect that the wife is not entitled to a right of action for loss of consortium similar to that of the husband's. Their Lordships were not unduly worried by the "illogicality" of legal rules. Lord Porter stated that "The Common Law is a historical development rather than a logical whole, and the fact that a particular doctrine does not accord with another is no ground for its rejection."³⁰ It would

paraissent inconciliable avec les besoins pratiques, que fait apparaître le jeu des intérêts dans la vie juridique." F. Génys, *Méthode d'Interprétation*, 1932, vol. i, Chap. 3, pp. 41-53, in particular paras 21, 22 and 23; quotations from p. 46.

²⁷ (1745) Willes 577.

²⁸ 39 T.L.R. 429.

²⁹ [1952] A.C. 716. The principles involved are clearly analysed by Mr. N. S. Marsh in 67 L.Q.R. 37.

³⁰ There is no doubt that this is a generally recognised principle. Lord Halsbury's famous dictum in *Quinn v. Leatham* [1901] A.C. 495 that "every lawyer must acknowledge that the law is not logical at all" has been a standard phrase in every lawyer's dictionary. Also cf.: "I am not concerned with defending the

then appear that the word "logical" has a specific meaning in jurisprudence, as in most cases "logical" or "rational" means "desirable" or "in accordance with common sense." It could hardly be expected from lawyers, who wish to see the law keeping up with changing social conditions, that they should insist upon a logical (in the formal scientific sense of the word) development of the law.³¹

There are other practical and more obvious ways in which ethical criteria are attached to legal rules.³² Legislation is, perhaps, the most conspicuous example as it is mainly through legislation that society expresses its moral standards. Thus public dislike of corporal punishment led to its abolition by section 2 of the Criminal Justice Act, 1948. It is significant that Roguin restricted his logical system to "possible" law by providing the "possible alternatives," thereby allowing the legislator to formulate his "actual law" by the exercise of a process of arbitrary selection.³³ However, the application of legal standards and judicial discretion are no less important.³⁴ Thus, for instance, the legal

existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is," *per* Asquith L.J. in *Candler v. Crane, Christmas & Co.* [1951] 1 All E.R. 426, 442.

³¹ Dr. Goodhart states, *e.g.*, that the Law Reform (Contributory Negligence) Act, 1945, did not abolish the "last opportunity" rule but it placed that doctrine "on a rational basis"; see 65 L.Q.R. at p. 255. However, in terms of strict logic the "last opportunity" rule is by its very nature illogical, since there is no logical reason whatever compelling us to saddle the "last opportunity" upon one party in preference to the other. Most departures from established precedent are criticised as "illogical" if they are undesirable or greeted as "salutary innovations" if they are desirable. Those precedents which merely promote uncertainty are nearly always "illogical." There is in most cases an ulterior motive.

³² The points of contact between law and ethics have frequently been examined. For a recent account see Goodhart, *English Law and Moral Law*, Stevens, 1953; it is unnecessary, therefore, to consider the matter here in great detail.

³³ See Stone, *loc. cit.*, Chap. III, on Roguin, an analytical jurist who deserves to be better known. See in particular *ibid.*, § 10, pp. 86-7.

³⁴ Roscoe Pound, *Law and Morals* (*supra*), pp. 56 *et seq.* The historicist view (to use Professor Popper's term, see *loc. cit.*, *supra*, note 12, p. 83) is, of course, that legal rules are not determined by ethics but by history, that they are attached to historical factors rather than to ethical ones. This, however, is a fatalistic (historicist?) way of saying the same thing. "Legal analysis is of necessity determined by history, like its arsenal of concepts, its terminology. It is of necessity empirical; by the same token the *corpus juris civilis*, the 'Sachsenspiegel' and the German Civil Code are all empirical": Renner, *The Institutions of Private Law*, 1949, at p. 53.

standard of negligence varies from case to case as does that of the reasonable man.³⁵ Again judicial discretion has had a very definite influence in the development of the rules of equity, but it must not be allowed too wide a scope as it can threaten the very existence of legal rules as is the case with the tort of maintenance. The concept of public policy is by no means watertight as it is "a principle of judicial legislation or interpretation founded on the current needs of the community."³⁶ Finally, the words themselves which the law uses are capable of an infinite number of different meanings according to the person who interprets them and the circumstances to which they apply. "The practical work of the courts," wrote Professor H.A. Smith, "is very largely a matter of ascertaining the meaning of words, and their function therefore becomes the study of contexts. Since the number and variety of contexts is only limited by the possibilities of human experience it follows that no rules of interpretation can be regarded as absolute."³⁷

It has been argued that there are some legal rules that are not related to any social or ethical principle and are therefore "indifferent," or as Aristotle called them "conventional."³⁸ These derive their validity not from any ethical principle but from the mere fact of their being enacted.³⁹ Upon closer examination, however, it can be seen that the difference is not one in kind, but only in the degree, of the social value-element involved. The analysts here have perpetuated the old fallacy of assuming that no value-element

³⁵ "Here the judicial method, being what it is, shows two rather conflicting tendencies. One is to get as near exactness as may be in the rules relating to what is regarded as reasonable. The other is to recognise that complete exactness is neither attainable nor desirable. Nor is this all . . . different judges may take variant views on the same question with respect to such an elastic term": Winfield, *Textbook of the Law of Tort*, 5th ed., p. 22.

³⁶ Winfield, 42 H.L.R. 76, at p. 92. See generally Paton, *Jurisprudence*, 1946, pp. 102-6.

³⁷ *Journal of Comparative Legislation* [Nov. 1927] in "Interpretation in English and Continental Law."

³⁸ *Nicomachean Ethics*, v, 7.

³⁹ e.g., traffic regulations; see generally, Pound, *An Introduction to the Philosophy of Law*, 1922, pp. 25-6; also Pound, *Law and Morals* (*supra*), pp. 72-4, where, however, the learned author accepts this traditional distinction. Note that traffic regulations are a social necessity since they serve to limit road accidents. See H. Cairns, *loc. cit.*, pp. 25-8.

exists in those rules which for historical and ethical reasons our society takes for granted. In fact, even these so-called "conventional" rules have some ethical function, although, perhaps, not an obvious one, namely the function of maintaining what Professor Pound would call "the social interest in the general security."⁴⁰ The awareness, in the present century, of the impossibility of separating the "pure" structure of the law from "metajuristic" considerations, has had a direct effect upon the form of modern legislation. Thus for example, Art. 1 of the Swiss Civil Code of 1907 quite uninhibitedly declares that gaps in the Code entitle the judge, when confronted with a case, to act as a legislator.⁴¹ This modern practice shows that the art of legislation has travelled very far from the nineteenth-century illusion, that an extension in the structure of the Code is all that is needed in order to eliminate all the gaps.⁴²

II. The second part of our inquiry is concerned with the particular political philosophy that the analytical method has revealed.

When speaking of the law of nature, lawyers tend to think much more of the confusion and the uncertainty that it is capable of causing to the law and much less of the technique through which natural law principles have been arrived at. Yet the essential similarity between the natural law technique and that of Analytical Jurisprudence is striking. The law of the seventeenth and eighteenth

⁴⁰ Professor Pound concludes his approval of the distinction with an example: "It is not a matter of morals whether we require two witnesses to a will or three"; however, the number of witnesses required is directly connected with the legislator's view as to the *best* method of securing the correctness of the will. *Contra* Dr. Goodhart, *English Law and Moral Law*, at p. 75.

⁴¹ The judge must be guided, however, by "le droit coutumier" and by "les solutions consacrées par la doctrine et la jurisprudence." Cf. the Austrian Code 1811, of the pre-analytical era according to which the court was asked to decide in the last resort, according to the "law of nature." The nineteenth-century Analytical Jurisprudence was a gap in the continuity of conscious adoption of ethical ideas.

⁴² Too much detail was one of the causes of the failure of the Prussian *Allgemeine Landrecht*, 1749; also cf. the difficulties that arose as a result of art. 4 of the *Code Civil* which punishes a judge who dismisses a case "sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi." See Gény, *loc. cit.*, para. 19, pp. 38-40.

centuries and Analytical Jurisprudence differ not in that the former was influenced by natural law ideas whereas the latter was not; they differ rather in that Analytical Jurisprudence for the first time since the Commentators treated the law as a distinct science. It is not surprising, therefore, to find that the Analytical School of the nineteenth century reveals a highly idealistic trend.⁴³ This idealism, however, is intellectual and rationalistic rather than empirical. "The Forms are thought but not seen" Plato said,⁴⁴ and Kocourek pleads for "an abstract system of classification," "the chemistry of the law," "the pure mechanics of the law."⁴⁵ It has indeed been suggested that the Analytical School set up a system of natural law of its own, although Pound points out that this "natural law" is not an ethical one.⁴⁶ It would be difficult to believe, however, that the ideal of a perfect legal structure could be completely free from ethical considerations.⁴⁷ It would be better to say that analytical idealism amounted to a metaphysical or intellectual natural law.⁴⁸ An ideal must have

⁴³ Cf. "It (the Form of the Good) is the cause of knowledge and truth." *Republic* vi, 507; cf. "It has been truly said that he who could perfectly classify the law would have a perfect knowledge of the law." Gray, *Nature and Sources of the Law*, 2nd ed., para. 15, p. 3.

⁴⁴ *Republic*, vi, 507.

⁴⁵ Quoted in Hall, *Readings in Jurisprudence*, at p. 338. The learned author does not however, ignore that "Analytical Jurisprudence does not create its premisses." *Ibid.*, at p. 339. Pound drew our attention (*Law and Morals*, p. 42, note 7) to the fact that the most eminent nineteenth-century analysts like Austin and Gray were specialists in Land law which is, as Professor Lawson has recently stated, "intensely abstract and has become a calculus remarkably similar to mathematics." *The Rational Strength of English Law*, 1951, at p. 79.

⁴⁶ Pound, *Law and Morals*, at p. 41.

⁴⁷ As suggested already, *supra*, I, at pp. 81 *et seq.*, esp. pp. 84, 85.

⁴⁸ Pound, *ibid.*, p. 47, note 13; the term is also used by Bishop. The Shorter Oxford Dictionary defines metaphysics as "The theoretical principles of some particular branch of knowledge" and states that it is a misinterpretation to use the term as denoting the supernatural. It is noteworthy that Analytical Jurisprudence has repudiated any connection with metaphysics: "The philosophy here described as scientific rejects metaphysical dualism, that is, any statement on an object beyond experience." Kelsen *loc. cit.*, p. 433; but legal "purity" must be beyond experience; see however, *supra*, note 21. Also: "The purpose of this metaphysics (*i.e.*, Plato's Theory of Ideas) is not—as is that of science—rationally to explain reality but rather emotionally to accept or reject it," *ibid.*, p. 12. Contrast, *Nouveau Larousse Illustré*, vol. vi, p. 57, under "métaphysique": "Connaissance des causes premières et des premiers principes, par ext. Philosophie, théorie générale et abstraite"; also *ibid.*: "la négation de la

an ethical purpose ; it cannot exist in a vacuum although it may well be that the ethical purpose is not an obvious one.

As it has been stated recently, "The analogy between mathematics and justice had precedents which went back to Plato."⁴⁹ It is to the existence of this latent principle of natural law in Analytical Jurisprudence that we must now turn our attention. The similarity of method may be illustrated by reference to the technique employed by Plato, Kant, Grotius and Bentham. All these thinkers differ widely from one another in many ways ; they have, however, one thing in common, namely the attribute of "logic" and "self-evidence" which they gave to their arbitrary assumptions. This will make it possible for us to consider the analytical approach as a means capable, by its very nature, of conveying a specific social and ethical message.

Plato used his theory of Forms to arrive at the ethical Form of a perfect and eternal Good. His dialectical technique was based upon certain ethical assumptions which he considered to be universally recognised self-evident truth. Thus he argued that perfect justice is more profitable than perfect injustice, since justice is a virtue and injustice a vice ; assuming now that all organs have a function and that virtue is the function of the soul, a man whose soul has been deprived of its proper function must be miserable. Therefore it cannot be profitable to be unjust.⁵⁰ It is obvious, from this example, that Plato's "logic" and "self-evidence" of his arguments have been used for the purpose of conveying a specific ethical belief.⁵¹

When we turn to Kant, we observe that he was particularly concerned with the self-evidence of the categorical imperative. He claimed that his method was an a-prioristic one, that is, a method free from empirical

métaphysique est, à sa manière, une métaphysique"; also see *Chambers Encyclopaedia* (1950) under "metaphysics" vol. 9, p. 331: "What is much more disturbing is that certain philosophers, including all positivists, profess to be strenuously antimetaphysical."

⁴⁹ A. P. d'Entrèves, *Natural Law*, at p. 54.

⁵⁰ Republic I, 353-4. Cf. I, 342, 346.

⁵¹ Bertrand Russell, *loc. cit.*, 863.

considerations. "Though all our knowledge begins with experience," he wrote, "it by no means follows that it all arises out of experience."⁵² From this "pure" knowledge he arrived at the rule of reciprocal freedom and his definition of law, that "law is the sum of the conditions under which the will of one can be united with the will of another according to a general law of freedom." Kant was in no doubt that this conclusion followed as a mathematical axiom. He said that "Mathematical science affords us a brilliant example, how far, independently of all experience, we may carry our *a priori* knowledge."⁵³ This, however, cannot hide the fact that under the cloak of "pure" reason, an essentially liberal philosophy, a "humane" philosophy, as Kant himself would have termed it, had been expounded. As H. Cairns said: "In the actual formulation of his theory of right, he (Kant) constantly appeals to experience; and the final statement of his theory signifies little until empiricism discloses its meaning."⁵⁴

Even more significant is, perhaps, the adoption of the quasi-mathematical method by Hugo Grotius. Surprisingly, the analytical method, far from being the exact opposite of the technique used by Grotius, bears a close resemblance to it. Thus Grotius's method was also an *a-prioristic* one akin to mathematics. He maintained that "God Himself cannot make twice two not be four; and in like manner, He cannot make that which is intrinsically bad not be bad."⁵⁵ Then follows a passage that might well have been written by any nineteenth-century analytical jurist: "The reader will do me injustice if he judges me to have written with regard to any controversies of our time; either such as already exist, or such as can be foreseen as likely to arise. I profess in all sincerity, that, as mathematicians consider their figures

⁵² *The Critique of Pure Reason* (Meiklejohn's transl. Everyman's) Intro. I, at p. 25.

⁵³ *Ibid.*, Intro. III, at p. 29; cf. *ibid.*, where Kant approves of Plato's approach; also see A. D. Lindsay, *Kant*, (1934) at pp. 62-3.

⁵⁴ *Legal Philosophy from Plato to Hegel*, at p. 339; cf. A. D. Lindsay, *loc. cit.*, at p. 287: "When we come to Kant's account of ethics, he seems to suppose that reason produces the moral law entirely of itself with no reference to experience."

⁵⁵ *De Jure Belli ac Pacis*, I, i, x, para. 5, Whewell's translation.

as abstracted from body, so did I, in treating law, abstract my mind from every particular fact.”⁵⁶ It is true that in the eighteenth century natural law became a useful slogan for various political and social causes; it retained, however, the belief in mathematical “self-evidence.” It may well be that the nineteenth-century analytical reaction was partly due to the desire to recover the belief in “self-evident” legal truth, free from empirical and utilitarian considerations.

With Bentham and the Utilitarians we come much closer to Analytical Jurisprudence and Austin. Bentham attacked natural law and the metaphysical a-prioristic approach of the previous thinkers and put in their place “these eternal and irresistible sentiments”⁵⁷ of pleasure and pain. The pursuit of happiness for the greatest number; however, would have led Bentham to the sacrifice of the individual to the community,⁵⁸ were it not for the fact that he adopted an argument strangely reminiscent of Plato, namely, that the individual cannot be unhappy in a happy society. He wrote: “That which is conformable to the utility, or the interest of a community, is what tends to augment the total sum of the happiness of the individuals that compose it.”⁵⁹ He considered as a self-evident truth that pain and pleasure were absolute values when he said: “Pain and pleasure are what everybody feels to be such—the peasant and the prince, the unlearned as well as the philosopher.”⁶⁰ Thus Bentham started off by demolishing natural law but finished by formulating “in utilitarian terminology many maxims which metaphysical philosophers would have expressed in terms of duty and natural law principles.”⁶¹ Furthermore, the

⁵⁶ *Loc. cit.*, *Prolegomena*, para 58; I have altered Whewell's translation of the word “*jure*” from “*Rights*” to “*Law*.”

⁵⁷ Bentham, *Principles of Legislation*, 1876, p. 2.

⁵⁸ See Hobhouse, *Liberalism*, at p. 67: “So far as the question of right is concerned the Benthamite principle might be regarded as decidedly socialistic or even authoritarian. It contemplates, at least as a possibility, the complete subordination of the individual to social claims.”

⁵⁹ Bentham, *loc. cit.*, p. 2, *cf.* Plato *Republic*, ii, 368: yet although the argument is similar the conclusions reached are ultimately different.

⁶⁰ Bentham, *ibid.*, p. 3.

⁶¹ Friedmann, *Legal Theory*, 3rd ed. (1953), p. 215. See also *ibid.*, Chap. 16 and 18, for the best short account of Utilitarianism from the legal standpoint; also Stone, *loc. cit.*, Chap. X.

individualistic and egalitarian nature of his utilitarianism led him to regard law as a necessary evil. It is not surprising, therefore, that his empirical method was employed for the purpose of reaching conclusions which would promote, in his view, individual liberty in a *laissez-faire* society. "Horrible dictu" wrote Professor Friedmann⁶² "we are more or less back to Kant and his definition of law. Only the result is not derived from the categorical imperative but from the pursuit of pleasure."

So far it has been suggested that nineteenth-century Analytical Jurisprudence was not incompatible in principle with a belief in a natural law, which we have called a metaphysical or intellectual natural law. We must now examine how far the analytical technique was similar to the method adopted by other philosophical schools and to what extent the Analytical School reveals its ethical and social premisses.

Austin saw a strong link between law and mathematics and considered the former not very dissimilar to the latter. He wrote, "And with regard to an accurate and ready perception of analogies, and the process of inference founded on analogy (*argumentatio per analogiam* or *analogica*) the basis of all just inferences with regard to mere matter of fact and existence, the study of law (if rationally pursued) is, I should think, better than that of mathematics, or any of the physical sciences in which mathematics are extensively applicable."⁶³ Apart, however, from this relationship to mathematics, Austin's "self-evidence" of the analytical structure was based on "logic." But his "logic," like that of the previous thinkers, was never free from an ultimate purpose. It has already been said that the analytical approach, which started as a method of study, was turned into an end. One important consequence of the analytical movement was, therefore, that it created its own ends. It was right that logical argument should prevail for its own sake.

⁶² *Loc. cit.*, p. 214.

⁶³ Austin, *loc. cit.*, ii, 1123. H. Cairns finds "that this (Austin's method) is the Socratic-Platonic method of enquiry scarcely needs to be pointed out." *Loc. cit.*, p. 16.

Austin said that everybody must admit that law ought to be known irrespective of what we may think of its provisions. However, if the words "ought" and "right" have any meaning at all, they must have either an aesthetic or an ethical one. As it has not been suggested that the jurists' quest for knowledge was of an aesthetic nature, the rightness or oughtness of the analysts' task must have been directly connected with some definite standards of right and wrong: a standard of ethical nature. Another consequence was that it was erroneously assumed that a conceptual legal structure is independent of "non-legal" premisses. It was further argued that if there is one legal "truth" to be elicited by logic, there must be only one legal structure; therefore all legal systems may ultimately be reduced to a common pattern.⁶⁴ The results of this last assumption were striking. First, Austin spoke of the "various principles common to mature systems,"⁶⁵ and came to the conclusion that certain legal notions were "necessary."⁶⁶ These concepts (or Forms in the Platonic sense) were taken as having universal validity. Austin said that the resemblances between legal systems "are necessarily confined to the resemblances between the systems of a few nations, since it is only a few systems with which it is possible to become acquainted, even imperfectly. From there, however, the rest may be presumed."⁶⁷ Thus jurists were led to believe that similarity

⁶⁴ It is interesting to note that Leibnitz, a jurist and a logician, who elaborated the relationship between justice and mathematics, was planning as early as 1667 a complete survey of the laws of the civilised world; see Gutteridge, *Comparative Law*, 2nd ed., 1949, p. 12. Also see on Leibnitz, *Great Jurists of the World*, 1913, pp. 283, *et seq.* Also Austin *ibid.*, ii, p. 1123, on Leibnitz's view. As early as 1885, Sir Henry Maine had this significant comment to make: "Legal conceptions are indeed extremely stable. . . . Their great stability is apt to suggest that they are absolutely permanent and indestructible; and this assumption seems to me to be sometimes made not only by superficial minds but by strong and clear intellects. I am not sure that even such juridical thinkers as Bentham and Austin are quite free from it. They sometimes write as if they thought that although obscured by false theory, false logic, and false statement, there is somewhere behind all the delusions which they expose a framework of permanent legal conceptions which is discoverable by a trained eye, looking through a dry light, and to which a rational Code may always be fitted." *Early Law and Custom*, 1885, at p. 360.

⁶⁵ Austin, *loc. cit.*, pp. 1101-8.

⁶⁶ Austin, *ibid.*, ii, 1108.

⁶⁷ Austin, *ibid.*, p. 1113.

between English law and Roman law as regards terminology must reveal similarity of substance. Wittgenstein said that "we are apt to fall into the trap of supposing things which are called by the same name must have something in common: whereas the fact may be only that there is a 'family resemblance' between them." For instance the fact that the term "possession" is common to English and Roman law has been the cause of many difficulties.⁶⁸ But no single theory of possession has been constructed which could fit both systems equally well. As Holdsworth points out "unfortunately for the interpretation of (Roman) texts, they have fallen into the hands of German legal philosophers, who have constructed from them logical theories which never wholly fit the actual rules, because these rules were like the rules of English law, made to fit the illogical facts of life."⁶⁹ Any differences were attributed to our imperfect knowledge, rather than to any fundamental difference of the concept as understood by different legal systems, a view which is remarkably similar to Plato's.⁷⁰ Secondly, attempts were made to discover the "lowest common denominators of the law," that is, the fundamental basic concepts into which law may be analysed. In this field, Hohfeld's work is outstanding.⁷¹ Thirdly, comparative law, as understood today, may be said to owe its existence to the analytical trend. It was not a coincidence that it appeared in its modern form during the second half of the nineteenth century. Its

⁶⁸ Winfield said about the theory of possession that "its weakest spot is its slovenly terminology." *Law of Tort*, 5th ed., p. 309. It is noteworthy that Bracton's introduction into English Law of the Roman distinction between ownership and possession, which he identified with seisin and right, was responsible for a great deal of the confusion. See Plucknett, *A Concise History of the Common Law*, 4th ed., p. 339.

⁶⁹ *History of English Law*, vii, 467, quoted in Paton's, *Jurisprudence* at p. 431.

⁷⁰ See Austin, *ibid.*: generally pp. 1108-12; *cf. Republic*, v, 472: "It was in order to have a standard that we were inquiring what justice itself is like. . . . We had no desire to prove that these standards could be realised." Also *cf.* "Strictly Platonic Ideas are not abstractions from sense-data inasmuch as sense-data are only approximations of the Ideas." H. Cairns, *loc. cit.*, p. 38, n. 27.

⁷¹ Hohfeld, *Fundamental Legal Conceptions* (first printed 1913), 63-4, quoted by Stone, *loc. cit.*, p. 115; also *ibid.*, Chap. V, for a critical appreciation of Hohfeld's work.

function was stated to be "to find in the law 'the equivalent of correlation of structure in anatomy, *i.e.*, like structures performing like functions.' " ⁷² All these results, in many respects beneficial, could not have followed if Analytical Jurisprudence had been conceived as free from ethical criteria. It was the presence of a value judgment that gave to the analytical jurists the strength and the faith to develop their particular brand of legal idealism. Admittedly, this idealism was not directly connected with any political movement; it was, nevertheless, still an ethical ideal.

We must now consider the extent to which the Analytical School reveals its ethical and social premisses. Austin, as has already been seen, was careful to exclude all references to extra-legal considerations lest they would deprive the law of its quasi-scientific status. Indeed, he was so anxious to avoid questions of value that he occasionally gave the impression that non-reference to extra-legal factors amounts to their successful exclusion from the realm of jurisprudence.⁷³ It was, in fact, a peculiar characteristic of the analytical trend that it created its own movement which stood for the independence of the law from outside interference. Its motto, if any, would have been "leave the law to the lawyers." But the independence of the movement was more apparent than real, and the opportunity was quickly seized by some thinkers to portray the analytical trend as having a particular social function. Max Weber explained, for example, that the pursuance of a lawyer's ideal "favours the better organised and economically more powerful side," ⁷⁴ in which he included the lawyers. Marxist theory interpreted the ideal as a selfish interest in the perpetuation of the

⁷² Gutteridge, *loc. cit.*, at p. 16.

⁷³ Austin, *loc. cit.*, pp. 1113-4: "Whenever an opinion is pronounced upon the merits and demerits of law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; but it may be questioned whether earnestness be less favourable to impartiality than indifference; and he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes."

⁷⁴ Friedmann, *Legal Theory*, 3rd ed. (1953), p. 190; also generally on Weber, *ibid.*, pp. 189-191.

exploitation of the working class.⁷⁵ Both these interpretations, however, are inconsistent with Austin's background and the climate of his century. Austin's message may appear as an essentially liberal one, as his analytical system promoted freedom under the rule of law and his premiss, namely, his concept of sovereignty, was fundamentally derived from the liberalism, in the widest possible sense of the term, of the nineteenth century.⁷⁶ It was not a coincidence that Dicey, who had studied Austin's work,⁷⁷ emphasised later in the century the importance and the political significance of the rule of law as opposed to discretion. It is indeed in this respect that Austin's analysis acquires social and ethical significance. There is no doubt that the creation of a legal science by a stricter definition of the boundaries of jurisprudence could not but help in the formulation of the political and social principle of government by the rule of law. In our century we have come to recognise that individual liberty is threatened not so much by the increase of administrative regulation as by the lack of it.⁷⁸

On the other hand Austin had also spoken of sovereignty and meant legal sovereignty as a legal fact without being very concerned with the political sovereign. Even he, however, identified the legal sovereign with its political counterpart. He said that "Adopting the language of most of the writers who have treated of the British Constitution, I commonly suppose that the present Parliament or the Parliament for

⁷⁵ R. Schlesinger, *Soviet Legal Theory*, p. 19: "The State, from which Law emanates, is a product of the struggle of the classes and is dominated by those classes responsible for social production. Therefore, law is bound to serve, and to develop with, the economic interest of those classes."

⁷⁶ The personal friendship between Austin and Bentham, although not evidence in the strict sense, is nevertheless significant of the community of values. See Stone, *loc. cit.*, at p. 56.

⁷⁷ "... it is clear that Dicey was following in the steps of Austin in being the first to apply the method of analysis to constitutional law. . . ." Dicey, *The Law of the Constitution*, intr. by E. C. S. Wade, p. cxlii.

⁷⁸ "The rule of law could clearly not be preserved in a democracy that undertook to decide every conflict of interests not according to rules previously laid down, but 'on its merits'": F. A. Hayek, *The Road to Serfdom*, at p. 62, note 1. This is the old conflict between Plato favouring discretion, since laws are mere averages, and Aristotle to whom we owe the concept of the State and its servants being bound by rules, thereby giving freedom to the citizens.

the time being, is possessed of the sovereignty.”⁷⁹ Dicey’s comment upon this statement was that “The plain truth is that as a matter of law Parliament is the sovereign power in the state, and that the ‘supposition’ . . . is the correct statement of a legal fact which forms the basis of our whole legislative and judicial system.”⁸⁰ He went on to say that “This is from a legal point of view the true conception of a sovereign, and the ease with which the theory of absolute sovereignty has been accepted by English jurists is due to the peculiar history of English Constitutional Law. So far, therefore, from being true that the sovereignty of Parliament is a deduction from abstract theories of jurisprudence, a critic could come nearer the truth who asserted that Austin’s theory of sovereignty is suggested by the position of the English Parliament. . . .”⁸¹

In this article, I have tried to show two things. In the first place, I have attempted to look upon Analytical Jurisprudence from the analytical and the philosophical standpoint. This revealed that nineteenth-century Analytical Jurisprudence, far from achieving the creation of a pure legal system free from social and ethical considerations, was based upon several arbitrary assumptions. The reason for this was that the analytical jurists tried to create a logically perfect system out of a discipline which was not very suitable for this process of abstract analysis. Austin’s extremist tendencies towards abstraction and the *Begriffsjurisprudenz* were not dissimilar to Plato’s theory of Forms in that legal concepts were conceived as being something separate from the social substance which they represented. The difference is that whereas Plato could imagine an ideal world of Forms without having to conform to actual conditions, Analytical Jurisprudence had to force these logical concepts into a discipline which could neither be expressed nor understood except in its special social context. One of the main analytical fallacies was the view that impartiality and non-reference to social and

⁷⁹ Austin, *loc cit.*, 253.

⁸⁰ Dicey, *loc. cit.*, 75.

⁸¹ *Ibid.*, 72.

ethical factors was enough to exclude these "extra-legal" considerations from the legal structure. We have seen that these measures could not have been effective, because even an impartial jurist deals with a legal system which expresses a certain moral and political standard. Another fallacy, which originated with Aristotle and was perpetuated by both analytical and sociological jurists, was that when a legal rule does not involve an obvious question of value, it contains no value-element at all. Ethics and law are indeed different disciplines and our greatest debt to the nineteenth-century analysts is, perhaps, that they were the first to create a distinct science of jurisprudence. This, however, does not mean that law can be understood without reference to social and ethical factors. As I have tried to show, there are both strictly logical and practical reasons which support this contention.

In the second place, I have attempted to discover whether the ethical content of Analytical Jurisprudence reveals any definite social and ethical principle. By comparing the analytical method with the method adopted by other philosophical schools both a-prioristic like Plato's, Kant's and Grotius's and empirical like Bentham's, I arrived at the conclusion that Analytical Jurisprudence must be the expression of a particular ethical principle. The arbitrary assumptions of Analytical Jurisprudence are not very different from the assumptions of other philosophical schools. Most of them, like Austin's analytical school, considered their ultimate conclusions to be self-evident truth like a mathematical axiom. Even Bentham's empiricism was arbitrary, in that he assumed that pleasure and pain were universal values. As we have seen, however, this mathematical self-evidence was a convenient fiction which was neither original nor new when Austin adopted it. What was the nature of Austin's ethical principle? I have suggested that his ethical ideal, the intellectual natural law which was his specific contribution, is to be found in the creation of a distinct science of Jurisprudence which made it possible for nineteenth-century liberalism to proclaim freedom through the rule of law, and also in the

concept of sovereignty. This, as Dicey suggested, was no mere abstraction and was based upon the constitutional doctrine of the sovereignty of Parliament.⁸² It is this principle of freedom which is the basis of Analytical Jurisprudence and which has affected not only Austin's specific doctrines but also the whole body of legal rules in the nineteenth century.

A. G. CHLOROS.

⁸² It was the failure of the Neo-Austinians to realise this fact that led them to their attempts to exonerate Austin of the charge that he was dictatorially minded. Their difficulty consisted in their desire to preserve Austin's definition of law as the command of the sovereign side by side with the democratic principle of the sovereignty of Parliament.

RECENT LEADING SCOTTISH CASES

By D. M. WALKER, PH.D., Professor of Jurisprudence in the
University of Glasgow

The doctrine of "recent possession" has been the noose which has caught many thieves and resellers, and some interest attaches to the two most recent applications. In *Brennan v. H. M. Advocate*, 1954 S.L.T. 255, B was charged with breaking and stealing. It was proved that goods corresponding to those stolen had been in his house shortly after the theft and had thereafter been transferred to the house of a co-accused, where they had been found by the police. It was argued that the doctrine did not apply, since the goods were not in the accused's actual physical custody when they were found. The conviction was sustained: it was not necessary for the application of the doctrine, it was pointed out, that the accused should still be in actual possession of the goods. Constructive possession might suffice, and did here, particularly since the accused was not a dealer in that kind of commodity. Hence it will not be a defence to have got rid of the goods just before the police come. The leading case, *Fox v. Patterson*, 1948 J.C. 104; 1948 S.L.T. 547, was distinguishable in that there the accused had parted with the goods in the course of trade and they were such as he dealt with in the course of his ordinary business.

CRIME—
"Recent
possession"—
Extent of
possession
requisite.

In the other case on recent possession, *Cryans v. Nixon*, 1954 S.L.T. 311, the accused owned a garage not far from which was an old railway van used as a store; it contained spare parts and scrap metal of kinds which could have been useful to him. Tracks were found leading from the van to the accused's premises and some of the stolen goods were found hidden in his garage: he had been away on business the morning after the theft. His conviction for theft was quashed on the ground that the surrounding circumstances were not sufficiently incriminating and that the accused had only had bare possession of the goods. Alternatively, the goods had not been found in his possession. The case was a narrow one on the facts, particularly since the

sheriff-substitute did not find the accused's explanation a reasonable one, but there was probably sufficient doubt to have justified Not Proven. The decision is largely one on its own facts but objection must be taken to the Lord Justice-Clerk's use of the word possession. "Bare possession is not enough; there must be possession and that possession must be such as to incriminate the accused." Surely by "bare possession" is meant "custody"—having the stolen goods on his premises, to some extent within his control but not having any proved *animus possidendi*. Greater clarity of analysis would tend to clearer law. "Recent possession" requires actual possession and not mere custody; that is surely the doctrine. Here the Crown proved, at highest, only custody and therefore the charge failed.

Some time ago (63 Jur.Rev. 262 and 66 Jur.Rev. 72) comment was directed to the cases of *M'Farlane v. M'Farlane*,

**DIVORCE—
Cruelty—How
"protection"
given.**

1951 S.C. 530; 1952 S.L.T. 8, and *Dobbie v. Dobbie*, 1953 S.C. 379; 1953 S.L.T. 281. In the latter of these Lord Strachan had declined to follow Lord Blades's decision in the former case in holding that decree of divorce on the ground of cruelty was precluded where the defender was the inmate of a mental hospital, on the view that the fact of the defender's confinement automatically gave the pursuer protection from continued or renewed assaults or other acts of cruelty. It was accepted in both cases that divorce on the ground of cruelty is a remedy for the protection of the pursuing spouse. Lord Strachan has now (1955 S.L.T. (Notes) 3), after proof, granted decree in *Dobbie* and his decision makes it clear that *M'Farlane* was in fact wrongly decided. In his opinion Lord Strachan drew an important distinction between the "protection" conferred by the confinement of the defender in a mental home, which is protection of the whole public, including the pursuer, and that other "protection" which is conferred by a decree of divorce; the latter gives protection to the pursuer alone by entitling her no longer to adhere to the defender (though such protection may in fact fall short in particular circumstances of actual physical protection, since, for example, the late defender might still meet, or even seek out, and assault his former spouse).

Certification of the defender does not give the pursuer the consistorial form of protection. This distinction between the two kinds of protection is valid and important, and clearly exposes the fallacy in the reasoning in *M'Farlane*, since it is clear that the scope of the two kinds of protection is different and they have different patrimonial consequences.

It is not often that the Lyon Court supplies a leading case, but the first case in the Lyon Court reports for 1955 seems to qualify for that class. *Law Society of Scotland* (1955 S.L.T. (Lyon Ct.) 2) is very interesting.

**ARMS—
Precedence of
legal societies.**

In that case (which was heard in 1952) Lyon not only made a grant of arms to the Law Society of Scotland, making it thereby not merely a corporate person in law (which it had been created by statute in 1949) but a corporate and armigerous gentleman: It became thereby an incorporation noble in the noblesse of Scotland. But furthermore, Lyon acceded to the request that it should be given precedence as of March 9, 1912. In this, as in so many other matters of law, precedence is normally determined by simple priority of date, the material date being that of the grant of arms. The effect of this ante-dating is to make the Law Society of Scotland rank behind only the Faculty of Advocates and the Society of Writers to H. M. Signet and before the Royal Faculty of Procurators in Glasgow. That this was justifiable in view of the special nature of the Law Society as national and all-embracing is clear, however hard it may be to the Royal Faculty to be put down a step. Also interesting is Lyon's remark, *obiter*, that the Faculty of Advocates' arms are those of the College of Justice undifferenced whereas the proper grant would have been of those arms suitably differenced to indicate that the Advocates were merely a member of the College of Justice, albeit a senior one. This grant of precedence to the Law Society also altered the *prima facie* status of the parties which had, held since 1949, as between 1949 and 1952 the various legal societies, other than the Advocates, W. S. Society and Royal Faculty, had been treated in alphabetical order, proper enough for persons of no nobiliary status: "It is in fact the only way in which such non-entities can be treated . . . and it was a proper enough original

basis." The other "nonentities" such as the Advocates in Aberdeen, the Scottish Law Agents Society, and local Faculties will still be ranked alphabetically. This decision should be noted in view of possible conflicting claims on state occasions.

Connelly v. H. M. Advocate, 1954 S.L.T. 259 is a salutary decision on power of punishment. C. was convicted before a sheriff and jury of attempted rape. The sheriff sentenced him to two years' imprisonment; he might, of course, have remitted him to the High Court for sentence. C. having appealed against conviction, the court refused the appeal and *ex proprio motu* raised the issue of sentence and after hearing further argument held that having regard to the fact that the sentence imposed by the sheriff-substitute was the maximum competent to him and that the case could have been remitted to the High Court for a heavier sentence it was competent for the High Court to increase the sentence, which they accordingly did, to five years' imprisonment. The limits of this principle are still vague. Does it apply only where the lower court imposes the maximum competent sentence? Does it apply also to summary proceedings? It does apply where the trial was in the High Court. Certainly the outcome of this appeal was more than Connelly bargained for when he lodged his appeal.

A small but rather material point of procedure was decided in *Coogans v. Macdonald*, 1954 S.L.T. 279, and it was a decision of a full bench, consisting of five Lords Commissioners of Justiciary. The sole point of the case was whether liability to be disqualified from driving in consequence of a conviction for contravention of section 11 of the Road Traffic Act, 1930, was a "penalty." If it were, in terms of the Criminal Justice (Scotland) Act, 1949, s. 46 (3) notice should have been served on the accused along with the complaint of his liability to this, in addition to the notice, which was given him, of his liability to fine or imprisonment. This question of construction the court resolved in favour of the

CRIME—

**Power of
High Court
to intervene
sentence.**

CRIME—

**Whether
disqualification
from driving
a "penalty."**

motorist by holding that disqualification was in fact a "penalty" of which notice should have been given him. The court rightly did not seek to distinguish between what were "penalties" and what were not. Furthermore, a contrary decision would have meant that when a court imposes disqualification it does not impose a penalty, whereas in the case of many drivers the disqualification is the most serious part of the penalty. Disqualification clearly fell within the concept of penalty as that term was defined in standard works of reference. The serving of notice, as Lord Justice-General Cooper put it, is a condition precedent of the power of the court to impose disqualification. It is noteworthy that the court did not lay down that such a notice must be served in every case where disqualification was competent by law, but that one must be served if disqualification were to be competently asked for in the event of conviction in that particular case.

RECENT LEADING ENGLISH CASES

By W. A. ELLIOTT, M.C., B.L., Advocate, and of the Inner Temple,
Barrister-at-Law

Re Wright, Blizard v. Lockhart [1954] 1 Ch. 347, decides an interesting point for English law which does not appear to have been decided in Scotland, namely, when does a charitable bequest "take effect"? This question is of importance to next-of-kin when one remembers that a bequest made for limited charitable purposes (without evincing a general charitable intention) which subsequently fail, does not fall into intestacy but is applied *cy-près* if it can be shown to have taken effect; *Anderson's Trustees v. Scott*, 1914 S.C. 942, and *Davidson's Trustees v. Arnott*, 1951 S.C. 42. The question, however, is when does a bequest "take effect"? *Re Wright* has now decided for English law (and the original Scots law on this matter derived from England) that a bequest for a particular charitable purpose sufficiently "takes effect" to justify a *cy-près* scheme if it was still capable of fulfilment *a morte testatoris*—albeit that owing to later supervening circumstances the charitable purpose was never in fact accomplished. In the case of *Wright* the particular bequest was for the building and endowing of a convalescent home which was never built but which was not proved to be incapable of being built *a morte testatoris*. The fact that the trust was also subject to a life tenancy was held to be immaterial. It will be remembered that in *Anderson* and *Davidson*, *supra*, the particular institutions which were the objects of the bequests were already in existence and so the actual bequests did not involve the founding or endowment of new institutions. But the case of *Wright* now decides that a charitable purpose still capable of fulfilment *a morte testatoris* is as much an entity as the bricks and mortar of an existing institution and although the bequest be to build and endow a hospital, that bequest can still "take effect" *a morte testatoris* although one stone is never laid upon another. The result of this

decision, if applied to Scotland, would mean that in a case like *Hay's J. F. v. Hay's Trustees*, 1952 S.C. (H.L.) 29, if it can be shown that, despite an intervening life-rent, the particular charitable purpose was feasible at the death of the testatrix, then it sufficiently "took effect" to justify a *cy-près* scheme.

Two recent English cases illustrate the principles upon which the English Court of Appeal is prepared to review an award of damages made respectively by a judge sitting alone and by a jury. It should be mentioned that in England most actions are now tried by judges sitting alone unless, under certain conditions, the plaintiff requests a jury trial; and the only actions in which a plaintiff is entitled as of right to trial by jury are actions of slander, libel, false imprisonment, malicious prosecution, seduction and breach of promise of marriage. Now the position regarding the review of awards made by county court judges is illustrated by *Shave v. J. W. Lees (Brewers), Ltd.* [1954] 1 W.L.R. 1300, where it was stated by Lord Chief Justice Goddard that in deciding cases of excessive or inadequate damages, unless it could be shown that the judge had gone wrong on a point of law (as by mistakenly taking some element of damage into account for which there was no evidence) the question as to what somebody should receive as compensation for injuries, pain and suffering was a pure question of fact that could not be reviewed by the Court of Appeal. Accordingly although the appellate court in *Shave, supra*, regarded the award by a county court judge of £750 to a person for minor injuries received in a motor-cycle accident as "wholly excessive" and said they themselves would only have awarded about £100-£150, the court was powerless to interfere. The jurisdiction of the court was limited by virtue of section 105 of the County Court Act, 1934.

DAMAGES—
Personal injuries
—Excessive or
inadequate
awards by judge
or jury—Power
of Appellate
Court to
review.

In *Bocock v. Enfield Rolling Mills, Ltd.* [1954] 1 W.L.R. 1303, the plaintiff chose to have his case tried by jury and was awarded a sum of £3,850 for serious injuries incurred to his left ankle and foot—a low award by English standards. He then asked the Court of Appeal to direct a new trial on the ground, *inter alia*, that the damages awarded by the jury were so low,

having regard to the nature of his injuries, that the verdict could not stand. The Court of Appeal admitted that the award was a low one but said it was not sufficiently low to warrant a new trial which was only granted in respect of excessive or inadequate jury awards if they were "out of all proportion to the facts." Regarding appeals against the awards of High Court judges sitting alone Singleton L.J. also observed *obiter*: "in such a case, while it is the duty of this court to remember that the judge sees and hears the witnesses, and while his decision on facts ought not to be lightly interfered with, the court does sometimes think it right to take steps to adjust the matter, and to say what the damages should be." A recent instance of the Court of Appeal altering a jury award is to be found in *Bates v. Stone Parish Council* [1954] 1 W.L.R. 1249, where an award of £17,500 was reduced to £9,000 on the ground that it "was a sum that no reasonable jury, properly directed, could give."

The position may then be summarised as follows:—In England the award of a county court judge is a pure question of fact which cannot be interfered with unless the judge has erred on some point of law. The award of a High Court judge can, however, be reviewed if it was unreasonable and so also a jury's award if it was "out of all proportion to the facts" or "such a sum that no jury, properly directed, could give." This also approximates to the position in Scotland except that the Court of Session is not so restricted in reviewing the award of a sheriff; see Walker, "The Law of Damages in Scotland," page 771.

In reality, of course, "reasonableness" can only have reference to the criterion of the normal average of (upheld) awards. In England the normal awards for personal injuries have grown under judicial guidance to be far higher than Scottish awards whose average level remains largely regulated by jury practice.

In *Adler v. Dickson and Another* [1954] 3 W.L.R. 696, a sailing ticket had been issued to the plaintiff by a shipping com-

CONTRACT— Third party's claim to exemption under contract—Jus quaesitum tertio.	pany for a Mediterranean cruise containing, <i>inter alia</i>, the following conditions: "Passengers are carried at passengers' entire risk . . . and the company will not be responsible for and shall be exempt from all liability in respect of any . . . injury whatsoever of or to the person
---	---

of any passenger . . . whether the same shall arise from or be occasioned by the negligence of the company's servants . . . in the discharge of their duties, or whether by the negligence of other persons directly or indirectly in the employment or service of the company . . . under any circumstances whatsoever." The plaintiff who was injured when mounting the gangway of the ship at a port of call, brought an action for damages against the master and boatswain of the ship. On a preliminary question whether the defendants were entitled to the protection admittedly afforded to the company by the conditions of the ticket it was held that they were not. But the *ratio decidendi* is far from clear, perhaps because there is no *jus quaesitum tertio* in English law such as might have exempted the defendants from liability in Scotland. Denning L.J. stated that if the exemption clause had been made expressly or by necessary implication for the benefit of the company's servants, then the master would have been entitled to enforce it, but he could find nothing to suggest that the plaintiff had expressly or by necessary implication assented to such a stipulation. Jenkins L.J., however, said that even if the provisions had contained words purporting to exclude liability of the company's servants, *non constat* that they could rely on them, for they were not parties to the contract. And Morris L.J. went so far as to say that unless the company had contracted as agents for its servants, the defendants could not claim immunity under the contract for their personal torts.

This case raises interesting possibilities, as there must be occasions when it would be worth while suing a company's servant (as, *e.g.*, the pilot of a B.O.A.C. plane) where his employers were exempted by contract from liability for negligence. In Scots law it would appear to depend on the interpretation of the contractual provisions whether they involved a *jus quaesitum tertio* in favour of the employee not to be sued. And employers could alter the terms of their contracts to ensure that such a *jus quaesitum tertio* was clearly conferred. But what would be the position under English law? It is by no means certain that altered provisions would have the same effect in England unless the actual employees were somehow made initial parties to the contract.

RECENT PRIVY COUNCIL CASES

Lang v. Lang ([1954] 3 W.L.R. 762) raised an interesting question in the law of constructive desertion. The appeal was by the husband from a judgment of the High Court of Australia dismissing the appellant's appeal from a judgment of the Supreme Court of Victoria whereby it was held that the wife, the present respondent, should be granted a decree *nisi* of divorce on the ground of the appellant's constructive desertion. The parties were married in South Australia in November, 1924. In October, 1951, the wife petitioned the Supreme Court of Victoria for a decree of divorce on the ground that the husband had wilfully deserted her without just cause or excuse and had continued in desertion for over three years. The husband denied that he had been guilty of constructive desertion.

The Board stated that the whole and sole question was whether the wife had proved the necessary animus or intent on the part of the husband. How should that animus be ascertained? In particular, (1) was it enough for her to show a course of conduct on the part of the husband which in the eyes of a reasonable man would, by making her life insufferable, be calculated to drive the wife out, the husband's actual intention being immaterial on the footing that every man was presumed to intend the natural and probable consequences of his acts? Or (2) should the objective criterion of the reasonable man's reactions be rejected on the footing that the real question was, did this particular husband (who might not have been reasonable) know that his conduct, if persisted in, would in all human probability result in the wife's departure—it being remembered that it was possible (human nature being what it was) for such knowledge on the husband's part to co-exist with a desire that she should stay, since people often desired a thing but deliberately acted in a way which made that desire unreasonable. Or, again (3), should inferences which would naturally be drawn be wholly disregarded and an intention which would naturally be drawn from the husband's conduct negatived provided there was proved

to exist, *de facto*, on his part a genuine desire (however illogical or impossible it might be to square such a desire with his conduct) that the matrimonial union should continue? On that view the husband's desire to maintain the home was conclusive whatever his conduct. All three of those views had found expression in the decided cases.

Reference was made to the two conflicting views on constructive desertion which could be extracted from the English authorities as expressed by Denning L.J. in *Hosegood v. Hosegood* ((1950) 60 T.L.R. (Pt. 1) 735, 738)—(1) that a husband was not to be found guilty of constructive desertion, however bad his conduct, unless he had in fact an intention to bring the married life to an end: *Boyd v. Boyd* ((1938) 55 T.L.R. 3), and (2) that, if his conduct was so bad or unreasonable that his wife was forced to leave him, he must be presumed to have intended her to leave however much he might in fact desire her to remain: *Sickert v. Sickert* ([1899] P. 278, 283-4; 15 T.L.R. 506) and *Edwards v. Edwards* ([1948] P. 268; 64 T.L.R. 61; [1948] 1 All E.R. 157). The views expressed in *Bain v. Bain* ((1923) 33 C.L.R. 317, at p. 325) were approved. In that case, the Board said, the High Court of Australia visualised the problem which might arise where the husband appeared to be actuated by "intents" which conflicted with, or contradicted, each other. The answer given was, in substance, that in such a conjecture the dominant intention must be ascertained and looked to. The passage in *Bain v. Bain* (*supra*) stated: "A man may intend to retain his wife's presence, but also at the same time to pursue a certain line of conduct. If at all hazards he deliberately pursues that line of conduct, his intention to retain his wife's presence is conditional on or subservient to the other intention. If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing, it cannot be said with any truth that the husband intends her to remain. He knows in that case that the result of his deliberate act will be and is his wife's withdrawal, and, therefore, in every real sense he intends that withdrawal."

The Board were of opinion that that passage went to the root of the matter. But they ventured to question whether, in strict terminology, a man could be said to entertain conflicting "intentions." A man might well have incompatible desires. He might

have an intention which conflicted with a desire; that was, he might will one thing and wish another, as when he renounced some cherished article of diet in the interests of health. But "intention" necessarily connoted an element of volition; desire did not. Desires and wishes could exist without any element contributed by the will. What, then, was the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-existed with a desire that that result should not ensue? That was the substantial point raised by the present appeal. Put more concretely, what legal inference was to be drawn where the whole of a husband's conduct was such that a reasonable man would know—that the particular husband must know—that in all human probability it would result in the departure of the wife from the matrimonial home? Apart from rebutting evidence, that was sufficient proof of an intention to disrupt the home. But suppose, further, that a husband's hope was that in some way his actions would not produce these natural consequences, that the wife would stay, and that the home would not be disrupted. Where a man's own actions were concerned and not their effect on another, the answer was easy. If he desired to resist temptation but yielded to it, his intention was evidenced by his acts. His better self was, it might be, overborne, yet in the end his intention was to yield. Where, however, the effect of his actions on other people was concerned and there was no certainty but only a high degree of possibility what the result would be, was a court to say that if he did entertain an unjustified hope that his wife would stay, the intention normally to be inferred from his acts was rebutted, and was the correct conclusion that he did not intend to drive her out? In their Lordships' opinion no such conclusion was justified. If the husband knew the probable result of his acts and persisted in them, in spite of warning that the wife would be compelled to leave the home, and, indeed, as in the present case, had expressed an intention of continuing his conduct and never indicated any intention of amendment, that was enough, however passionately he might desire or request that she should remain. His intention was to act as he did, whatever the consequences, though he might hope and desire that they would not produce their probable effect. To say that it was not enough unless he knew that separation must inevitably result from his

actions was to ask too much. Men's actions were not founded on certainty—in most cases certainty was unascertainable—but on probabilities. No doubt a high degree of probability was required, but not more. With those considerations in mind could it be said that the appellant had rebutted the natural inference, which would be drawn from his acts if no countervailing testimony was given? In their Lordships' opinion no sufficient ground had been given for rejecting the finding of the High Court, and the appeal would be dismissed.

Said Ajami v. Comptroller of Customs ([1954] 1 W.L.R. 1405) raised a question relating to the admission of expert evidence. The appeal was against a judgment of the West African Court of Appeal. By section 56 of the Evidence Ordinance of Nigeria: “(1) When the Court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom . . . are relevant facts. (2) Such persons are called experts.” By section 57: “(1) Where there is a question as to foreign law the opinions of experts who in their profession are acquainted with such law are admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.” Section 22 (1) of the Exchange Control Ordinance, 1950, of Nigeria, prohibited the exportation, among other things, of “any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory . . .”

**ADMISSION
OF EXPERT
EVIDENCE.**

The respondent, who was the Comptroller of Customs of Nigeria, claimed against the appellant a penalty of £61,778 2s. 6d. and the forfeiture of 9,884,500 French colonial franc notes on the ground that the appellant had on June 15, 1951, attempted to export the said notes, the export of which was prohibited by section 22 (1). On this appeal the appellant did not dispute that he attempted to export 9,884,500 notes from Nigeria on the date

in question. Nor was it disputed that the respondent was entitled to succeed in this appeal if it was held that section 22 (1) prohibited the exportation of the notes in question. It was further not disputed on the appeal that French West African Territory came within the meaning of the word "territory" in section 22 (1).

It was contended for the appellant that the evidence led by the respondent in the magistrates' court did not establish a fact sought to be proved in, and held to be proved by, the courts in Africa—namely, that the notes in question were legal tender in French West Africa on June 15, 1951. That was the sole point raised by the appellant and the sole point for the Board's decision. A branch bank manager, who had been engaged in banking business in Nigeria for twenty-four years, who had to and did, in the course of his business, keep in touch with current law and practice with regard to notes which were legal tender in French West Africa, gave the following evidence: "I look at these notes, they are to the best of my knowledge French colonial franc notes, they were legal tender in French West Africa on June 15, this year. On that day these francs were worth 490 to £1 English note. The English value of 9,884,500 is therefore £20,172."

The Board said that it had been argued strenuously that on a matter which involved a question of law no person who was not a professional lawyer could be regarded as a competent expert. Their Lordships stated that they did not agree. They shared the view expressed in *Vander Donckt v. Thellusson* ((1849) 8 C.B. 812, 814) that a person who, though not a lawyer, had become conversant with a point of foreign law "by carrying on a business which made it his interest to take cognisance" of the point, was a competent witness on that point. A number of other cases had been cited, and a principle which emerged from them considered together was that not only the general nature, but also the precise character, of the question on which expert evidence was required had to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert. So the practical knowledge of a person who was not a lawyer might be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. There was nothing opposed to the views expressed above in the relevant statute law of Nigeria—namely sections 56

and 57 of the Evidence Ordinance. The Ordinance enacted that the evidence of a person "specially skilled" on a point of foreign law was admissible as expert evidence. The knowledge which entitled a person to be deemed "specially skilled" on some points of foreign law might be gained in appropriate circumstances by a person whose profession was not that of the law. The Board were of the opinion, as stated, that the bank manager was a person who in the course of his business had to, and did, keep in touch with current law and practice with regard to notes which were legal tender in French West Africa, and that the notes of which exportation had been attempted must be held to be notes which were legal tender in French West Africa on June 15, 1951. They accordingly dismissed the appeal.

Associated Broadcasting Co., Ltd., and Others v. Composers, Authors and Publishers Association of Canada, Ltd. ([1954] 1 W.L.R. 1484), was an appeal from the Court of Appeal for Ontario reversing the order of the trial judge. The Court of Appeal awarded the present respondents \$75 damages and an injunction restraining the present appellants from infringing the respondents' copyright by performing in public a number of musical works, including "Sophisticated Lady" and "Ol' Man River."

COPYRIGHT:
Musical work:
equipment not a
"gramophone."

The question in the appeal was whether the performances, which were relayed from the studio of the appellant broadcasting company to premises in Toronto occupied by the other appellants, were given by means of a "gramophone" within the meaning of section 10 B (6) (a) of the Canadian Copyright Amendment Act (S.C. 1938, c. 27, s. 4) which provided: "In respect of public performances by means of any . . . gramophone in any place other than a theatre . . . to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the . . . gramophone."

The appellant broadcasting company had in its studio equipment which consisted, among other things, of turn-tables on which records of musical works were placed. The turn-tables were then made to revolve by an electric motor, and a stylus or needle was then placed in contact. The resulting sound waves

were converted into electrical impulses in the playing head and carried to an amplifier. The electrical impulses were then transmitted, under agreement, over the wires of a telephone company to the premises of subscribers who had contracted with the broadcasting company to receive the programmes thus relayed. At the subscribers' premises an acoustic reproduction of the musical works so transmitted was given in public by means of amplifiers and loudspeakers which were owned, installed and maintained by the broadcasting company pursuant to the contract, but were under the control of the subscribers.

The appellants claimed that a public performance by means of that equipment, mechanism or sum total of instrumentalities was a public performance by means of a gramophone within the meaning of the section. The argument in favour of that claim was neatly summed up in the appellants' case by saying that "the component parts or means used by the appellants for the performance in public of musical works are the component parts or means comprising a gramophone and producing the same result." The Board thought that the short answer to that argument, and therefore to the appellants' case, was that it begged a question—what is the meaning of the word "gramophone" in the section—by assuming that whatever mechanism on an analysis of its functions was seen to do what a gramophone did was therefore properly called a gramophone. It was conceded, as the Board understood the argument, that each one of the several components of the mechanism which had been described was an essential part of the gramophone. Therefore, to take a crucial test, the wires under the control of the telephone company, which were laid under parliamentary authority and might have extended for any distance, were a part of a gramophone. That would be nothing less than distorting the meaning of the word "gramophone." That word did not appear to have acquired a scientific meaning other than its popular or commercial meaning. In the latter meaning it clearly did not embrace a mechanism which (to take the same test) included an undefined length of wiring laid, perhaps under or over public streets, under powers given by Parliament not by the manufacturer or user of the mechanism, but by an independent authority. The appeal would accordingly be dismissed.

Ebenezer Theodore Joshua v. The Queen ([1955] 2 W.L.R. 8) was an appeal from a judgment of the Court of Appeal for the Windward Islands and Leeward Islands dismissing an appeal against a conviction and judgment of the Supreme Court of the Windward Islands and Leeward Islands whereby the appellant was convicted of effecting a public mischief and was discharged conditionally on entering into a recognisance to be of good behaviour and to appear for sentence when called on at any time within two years. He was indicted on three counts, the first and third charging sedition, the second charging a public mischief. The jury failed to agree on the first count and were discharged from returning a verdict; on the third count the appellant was acquitted. The second count which charged the appellant with effecting a public mischief, contrary to the common law, alleged that the appellant did by means of certain false statements in a public speech to the effect that the police were scheming politically and storing up a veritable arsenal at headquarters to shoot down the people when they decided to fight for their rights, agitate and excite certain sections of the public against the police, to the prejudice and expense of the community."

**CHARGE OF
EFFECTING A
"PUBLIC
MISCHIEF."**

The common law of England relating to criminal matters prevailed in St. Vincent.

The trial judge in his charge to the jury said: "It is for the judge to rule whether these acts, if proved, do or do not constitute the effecting of a public mischief. Holding as I do that the words complained of, in the context in which they are found, can only be construed as an attempt to bring the police into disrepute and to cause a certain section of the community to suspect, disrespect and, in all probability, to hate the police, I direct you, as a matter of law, that, if you find that he did utter the words complained of, he is guilty of the offence of effecting a public mischief." The jury returned a verdict of guilty on the second count by eight to one. The Court of Appeal held that the direction of the judge was right and dismissed the appeal.

Four questions were argued before the Board: (1) whether, apart from cases of conspiracy, there was any common law offence of effecting a public mischief; (2) whether the judge's

direction was right that the jury must as a matter of law find the appellant guilty if they found that he spoke the words charged; (3) whether the two offences of sedition and effecting a public mischief could be charged in respect of one speech; and (4) whether the appellant could be found guilty on an indictment charging that he did by false statements agitate and excite certain sections of the public when no evidence was given that any section of the public was agitated or excited by the appellant's speech.

The Board stated that the first question was one of general importance on which judges of great eminence had expressed conflicting views, but, not being necessary for the decision of the present appeal, their Lordships did not propose to deal with it. On the second question, they stated that it was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime existed) and to direct them on the facts if he thought that there was evidence to go to the jury, and it was for the jury to find whether the appellant was guilty on these facts. It was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found that he had spoken the words alleged. To do so was, in their Lordships' opinion, to usurp the function of the jury. The jury, while they must take the law from the judge, are the sole judges on the facts. On the third question it was highly undesirable that an accused person should be tried on counts that he made a seditious speech and also that he effected a public mischief by making the said speech; yet that was what happened in the present case, with the result that the jury found the appellant not guilty of sedition but guilty of effecting a public mischief by making a speech the mischief of which was its allegedly seditious nature. On the fourth question, on the indictment, as framed, there was no evidence to go to the jury. The appeal would accordingly be allowed and the conviction quashed.

CURRENT PERIODICAL LITERATURE

By K. W. B. MIDDLETON, B.A., LL.B., Advocate
Sheriff-Substitute of the Lothians and Peebles

Scotland has borrowed more law from England than the other way about. But Scottish lawyers have played a much greater part in English courts of law than English lawyers in Scotland. Most Scotsmen who have practised at the English Bar have learnt their law, if they have not received their earlier education, in England, and it would scarcely be a profitable study to examine the specifically Scottish impact on English forensic ideas or measures. All the same, an account of Scotsmen who have made a name for themselves in English courts, from Lord Mansfield to the present Lord Chancellor, is sure to interest. Lord Kilmuir himself told the story in an address last year, when he was still Home Secretary, before the Canadian Bar Association (*The Canadian Bar Review* for October, 1954). He picks out three men in particular, Mansfield and Erskine in the eighteenth century and Haldane in the twentieth century, as examples of three types of Scottish advocacy. Erskine was the forerunner, and indeed the master, of the militant advocates, like Russell, Carson and F. E. Smith. Haldane, skilful as he was at suiting his argument to his audience, made it his constant aim to discover and appeal to first principles. Mansfield was the lucid pleader whose mere statement of a case could be as persuasive as the arguments of others.

SCOTTISH ADVOCACY AND THE ENGLISH BAR

The Private International Law Committee appointed by the Lord Chancellor in 1952 was given as its initial task a consideration of desirable amendments in the law relating to domicile, with particular reference to the decisions in *Winans v. Att.-Gen.* [1904] A.C. 287 and *Ramsay v. Liverpool Royal Infirmary*, 1930 S.C. (H.L.) 83. The first report of the Committee was published last year, and the October, 1954, number of the *Law Quarterly Review* has a detailed study of its recommendations, which take the form of a draft code, by Professor Graveson. The Committee's code, consisting of five articles, is succinct and self-consistent and constitutes on the whole, Professor Graveson thinks, a great achievement. Not only have the Committee produced an intelligible code of domicile for England but one applicable to Scots law as well with slight modification. He has a good deal of criticism however to offer, mainly on the ground that the code in its present form is incomplete rather than that its provisions as far as they go are open to serious objection.

DOMICILE

One would perhaps hardly expect the Committee to propose any very revolutionary changes in the existing law. Nor does it. Article 1 lays down that a domicile is either a domicile of origin or of choice, and contains a definition of each. The most interesting innovation, Professor Graveson points out, is to be found in section 5 of this Article, which provides that "a domicile whether of choice or of origin shall continue until another domicile is acquired." The effect would be the disappearance of the traditional rule that a domicile of origin is harder to change in favour of a domicile of choice than is a domicile of choice itself, and there would no longer be room for a revival of the domicile of origin between the loss of one domicile of choice and the acquisition of another.

Article 2 deals with the ascertainment of a domicile of choice and involves no alteration of the existing requirement that there must be an intention to reside in a country permanently. Section 2 of this Article contains rules as follows for ascertaining a person's intention to choose a domicile: he shall be presumed to live permanently where he has his home, or his principal home if he has more than one, or where his wife and children have their home if he is stationed in a country for the primary purpose of carrying on a business, profession or occupation. The importance of these rules should not be under-estimated, for they might have a decisive effect in solving some of the most difficult problems that have arisen in practice, and go far to equate "permanent residence" with "habitual residence." In a note on the report of the Committee in the *Modern Law Review* for May, 1954, Mr. O. M. Stone expresses the view that the application of the presumptions would probably, as the Committee thinks, have reversed the decision in *Ramsay's* case, though he has doubts about *Winans' case*.

Article 3 of the code concerns that contentious question, the domicile of married women, and runs: "The domicile of a married woman shall be that of her husband: Provided that a married woman who has been separated from her husband by the order of a court of competent jurisdiction shall be treated as a single woman."

Both Mr. Stone and Professor Graveson are critical of the proposal. Mr. Stone is the more severe. As he says, the doctrine that a married woman by operation of law acquires any domicile which her husband may choose to acquire quite irrespective of the motive, however fraudulent as regards the wife, for which he chooses that domicile, or whether the wife has any knowledge of the domicile so acquired, or whether the husband contributes one penny towards the wife's support, was firmly established in its full rigour only quite recently. The "outmoded notion" of the unity of domicile which is inconsistent with legislative recognition in modern times of the rights of married women, should be swept away, and he hopes that Article 3 of the Code, in spite of the improvement suggested by the proviso, will never receive statutory support. Professor Graveson, on the other hand, thinks that in retaining the basic principle of the unity of domicile of husband and wife the Committee has shown wisdom and experience "not to be blinded by superficially attractive arguments on social justice and sex equality, whatever that may mean." But if this principle is only a rationalisation by law of the major fact

of family life, the law should no less rationalise by way of exception to the principle the fact that husband and wife often do not live together. The reasoning which led the Committee to recommend that a judicially separated wife should be permitted to acquire a domicile different from her husband's, but not a deserted wife, appears to him incongruous and contradictory. And the result would often be that the obtaining of a decree of judicial separation would simply be the first and somewhat formal step towards acquiring a separate domicile for purposes of divorce jurisdiction.

It is not quite clear what in Professor Graveson's view the rules relating to the domicile of married women should be, and whether he could go any further than to put a deserted wife in the same position as a judicially separated wife. The Committee was against the idea of giving a deserted wife a right to acquire a domicile of her own on the ground that the difficulties of deserted wives were a matter for consideration by the Royal Commission on Marriage and Divorce. It is indeed desirable that the question of a married woman's right in certain circumstances to choose a domicile separate from her husband's should not be mixed up with the different question of her right to obtain a remedy against her husband where he has been guilty of a matrimonial offence. But this distinction, which has already received partial recognition by the legislature, is overlooked by the Committee in its recommendation that a decree of judicial separation should be a prior condition of the acquisition of an independent domicile by a married woman. There may be cases in which the arguments for a wife's right to choose a separate domicile, although the parties are living apart by mutual consent, are just as strong or stronger than where she has been deserted. A good example is afforded by the facts in the leading case of *Mackinnon's Trs. v. Inland Revenue*, 1920 S.C. (H.L.) 171. A drunken husband was shipped off to Australia by arrangement between him and his wife and lived there until his death twenty-five years later. The parties did not communicate with each other from the time he left Scotland, and he entered into a bigamous marriage with a woman in Australia after he had been in the country about ten years. His wife did not hear of this until later. She then instructed divorce proceedings against him but died before she obtained divorce. The House of Lords held that her husband died domiciled in Australia and that accordingly, since her domicile followed that of her husband, the right to succeed to her moveable estate depended on the law of Queensland. Why should the law regulating the succession to Mrs. Mackinnon's estate be governed by the fact that her husband left Scotland by agreement with her instead of deserting her? And why should it matter for this purpose whether she actually obtained a decree of divorce against him or not? Though the existing law may lead, as in this case, to absurdities, it has at least the merit of being clear and certain. If it is to be changed, surely the only satisfactory alteration is to put a married woman in the same position as any other person who has the capacity to choose a domicile for himself or herself. This need not exclude a legal presumption to the effect that a married woman's domicile is that of her husband, a rule which would be as convenient, and no more objectionable from a feminist

point of view, than the practice of her assuming his surname. Such would appear to be the principle generally valid in the United States, and the Committee give no reason for not adopting the same, and it may be thought plainly desirable, principle in this country.

Article 4 of the Code deals with the domicile of infants and must be read subject to the difference between English and Scots law, in that a minor in Scotland has the capacity to change his domicile, while English law has to provide for such strange creatures as married infants. The major proposals in this Article are that (a) at the termination of the marriage of its parents, a child shall take the domicile of the parent having custody of it; (b) an adopted child shall take the domicile of the adopter; (c) if the parent changes his domicile the domicile of the child shall not be changed unless the parent so intends; and (d) a competent court shall have power to vary the domicile of a child for its welfare.

Finally Article 5 of the Code provides that a lunatic shall retain his existing domicile, unless it is changed with the approval of a court of competent jurisdiction in the country where he is at present domiciled.

Periodicals also received: *Documentation Juridique Étrangère* (Brussels), *Jus* (Milan), *Revista del Foro* (Lima), *The International and Comparative Law Quarterly*, *Oklahoma Law Review*, *Textes Législatifs Étrangers* (Brussels), *Revista General de Derecho* (Valencia), *New York University Law Review*, *The American Journal of International Law*.

RECENT LITERATURE

The Structure of Stair's Institutions, being the Twenty-first Lecture on the David Murray Foundation in the University of Glasgow. By Archibald Hunter Campbell, LL.M., B.C.L., M.A., Regius Professor of Public Law in the University of Edinburgh. Glasgow University Publications, No. XCVIII. 1954. Glasgow: Jackson, Son & Co. Price 5s. net.

In a most interesting Address, the fruit of much learning and research, Professor Campbell fully maintained the high traditions of the David Murray Foundation in Glasgow University, and it is very valuable now to have his Lecture in printed form. What adds interest to the Lecture is that it is an examination of Stair's *Institutions* through the eye of an English lawyer.

Professor Campbell sets out to show that Stair, while aiming at expounding Scots law as a rational discipline, was seeking, or at least has provided us with, a scheme which—though not logically perfect—yet forms a good practical working system. In Stair's scheme Professor Campbell finds several plans or patterns of thought, two of them not inconsistent with each other, but the third not fitting in quite harmoniously with the other two.

The first plan is the Roman law classification (based on the extrinsic object and matter of law) of Justinian's *Institutes*—"that short and very unoriginal work," than which "no other single book has contributed so much to the structure of modern jurisprudence"—which Stair has turned into a list of fundamental or substantive rights, the right being, he says, the proper object of law. Next, one finds Stair's master-plan—an exposition of rights, their constitution and nature, their conveyance and their cognition and enforcement, irrespective of their subject-matter. Whatever the origin of this pattern—and Professor Campbell has been unable to trace whether it was Stair's own—it is not inconsistent with the first plan which can be fitted into it, and it has this strong advantage that it is most valuable to the practitioner and learner in providing them with a scheme of the rules of our law. The third pattern is found in Books I and II, and this Professor Campbell thinks is the most interesting of all. It involves, in contrast to Justinian, the treating of Obligations before Property and, amongst obligations, the treating of conventional obligations or contracts last of all. This plan arises from Stair's views of the first principles of equity, *viz.*, obedience to God, freedom and voluntary engagements, from which one finds the famous classification of obediential and conventional obligations. It is quite different from Justinian's order and, though in terms of the master-plan Stair should be dealing with rights, he is emphasising obligations as limitations upon one of his fundamental rights. Once again the source of this plan is not easily found. It is not to be traced to the civilians and other jurists. Professor Campbell,

however, finds notable resemblances between Stair and the Second and Third Books of Pufendorf, of which he thinks Stair would have first-hand knowledge. It is true, of course, that the works of Stair and Pufendorf differ at various points in substance and form and that the outlook of the two men in the sphere of natural law was entirely different. Stair too had no need to be as exact and logical as Pufendorf. He was taking a broad view and writing in an eclectic attitude, the purpose before him always being the setting forth of the rules of Scots law. A notable example of Stair's approach is seen in his treatment of reparation, where he has no general observations on negligence, on the questions of duty and responsibility, which were yet treated in Roman law and by Pufendorf. This gap, in Professor Campbell's view, was caused by the absence of development in that department of Scots law at that time, and by Stair, in fulfilment of his main purpose, being unwilling to generalise where there was little material to work on or to force into his own scheme material already classed in a way his contemporaries understood.

The *Institutions* are again of much value and interest and indeed form a lesson to the analytical jurists, some of whom approach law purely from the "rights" aspect, others purely from the side of duty—outlooks that also affect practical issues, as Professor Campbell observes, for if one approached from the duty side, one might not, he says, approve of *Bourhill v. Young*. In so concentrating on either side, the jurist runs into difficulties which Stair seems to recognise for, in dealing with Property, he starts from the side of rights, in his treatment of Obligations he approaches from the side of the debtor's duty. If he in fact realised these difficulties he was much ahead of his time and of even a much later age; but it is not always clear, says Professor Campbell, what he had in mind, as one pattern is liable to be superimposed on another. And Stair's attitude may be due to the fact that, as his biographer, Aeneas Mackay, said, he saw law "not as most lawyers from one or two points of view only" but as a law-giver, an advocate, a judge, and a writer, and made full use of these unrivalled opportunities.

While Professor Campbell says that "as an outsider" he leaves it to Scots lawyers to say whether Stair achieved his purpose, there will surely be general agreement in his conclusion: "To me as an outsider it seems that his system serves his purpose at least as well as the systems of Gaius and Justinian, in which also we can discover logical chinks if we begin to probe curiously, served their purpose of expounding Roman law as a rational discipline. And, whether or not this can be said of Justinian, it seems to me that Stair's system gives a better picture, throwing emphasis just where the ordinary man and the practical lawyer would say that emphasis should fall, than any scheme begotten in the jurist's study by ruthless logic out of a one-sided point of view." The constant and invaluable use that has been made of Stair's *Institutions* by later writers and in daily practice is ample testimony of Professor Campbell's conclusion.

The legal profession are much indebted to Professor Campbell not only for his lucid exposition of a most interesting subject but for the suggestions which he makes for their reflection and research.

G. CAMPBELL H. PATON.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Clerk & Lindsell on Torts. Eleventh Edition. Editors, A. L. Armitage, M.A., LL.B., G. Ellenbogen, M.A., His Honour Judge Charlesworth, LL.D., T. A. Blanco White, B.A. 1954. London: Sweet & Maxwell, Ltd. Price £4 15s. net.

Law and Disorders. By Sir Carleton Kemp Allen, Q.C. 1954. London: Stevens & Sons, Ltd. Price 10s. 6d. net.

Chitty on Contracts. Twenty-first Edition. General Editors, John Burke and Peter Allsop. Volume I—General Principles; Volume 2—Specific Contracts. Common Law Library Nos. 1 and 2. 1955. London: Sweet & Maxwell, Ltd. Price £7 15s. net, 2 Volumes.

Islamic Law in Africa. By J. N. D. Anderson. With a Foreword by the Rt. Hon. Lord Hailey, G.C.S.I., G.C.M.G., G.C.I.E. 1954. London: H.M. Stationery Office. Price £2 10s. net.

Perjury Unlimited. A Monograph on Nuremberg. By Professor A. D. Gibb, Q.C. 1954. Edinburgh: W. Green & Son, Ltd. Price 3s. 6d. net.

The Essentials of Domestic Law in Summary Courts. By E. R. Guest, M.A., B.C.L. 1955. London: The Technical Press, Ltd. Price 2s. net.

Archbold's Criminal Pleading, Evidence and Practice. Fourth Cumulative Supplement to Thirty-third Edition. Edited by T. R. Fitzwalter Butler, Barrister-at-Law, and Marston Garcia, Barrister-at-Law. 1955. London: Sweet & Maxwell, Ltd.

The Judicial Control of Public Authorities in England and in Italy. A Comparative Study by Serio Galeotti, D.PHIL., DR.JUR.(Milan). With a Foreword by F. H. Lawson, D.C.L. 1954. London: Stevens & Sons, Ltd. Price 30s. net.

The Death Duties. Twelfth Edition. By Robert Dymond and Reginald K. Johns, LL.B.(Lond). 1955. London: The Solicitors' Law Stationery Society, Ltd. Price £4 15s. net.

Town and Country Planning Act, 1954. By Desmond Heap, LL.M., L.M.T.P.L. 1955. London: Sweet & Maxwell, Ltd. Price £1 10s. net.

Latey on Divorce. Supplement to Fourteenth Edition. By William Latey, Q.C., M.B.E., and John B. Gardner, M.A. 1955. London: Sweet & Maxwell, Ltd. Price 10s. 6d. net.

Alta Corte Per La Regione Siciliana: Decisioni—Atti Processuali—Repertorio della Giurisprudenza Costituzionale. I, II, III. Istituto di Studi Giuridici e Politici sulla Regione "Luigi Sturzo," Palermo. 1954. Milan: Dott. A. Giuffrè. Price L.6500 for 3 Vols.

Patents for Inventions and the Registration of Industrial Designs. Second Edition. By T. A. Blanco White of Lincoln's Inn, Barrister-at-Law. 1955. London: Stevens & Sons, Ltd. Price £3 3s. net.

Lowndes & Rudolf's Law of General Average and the York-Antwerp Rules. Eighth Edition. By J. F. Donaldson, B.A.(Cantab) and C. T. Ellis, M.C. 1955. London: Stevens & Sons, Ltd. Price £5 5s. net.

JURIDICAL REVIEW

MEDIEVAL SCOTTISH EXECUTORS AND THE COURTS SPIRITUAL *

ON August 24, 1560, an Act of the Convention of the Estates "statute and ordanit that the Bischope of Rome haif na Jurisdiction nor Autoritie within this realme in tymes cuming."¹ The ecclesiastical courts ceased to function and with them the existing system for the administration of the estates of persons deceased. Their place was taken by the Commissary Courts, which were established in 1563. Yet the *Instructions* given in that year to the newly appointed Commissaries say very little about testamentary and executry matters.² Only one of the relevant articles is not directly or indirectly concerned with securing the payment of quot and court dues and this article, Article XXIV, relates to the execution of testaments. Nor is much additional guidance given by the *Further Instructions* of

* Abbreviations listed in *The Sources and Literature of Scots Law*, Stair Society, Edinburgh, 1936, are followed. Protocol Books published by the Scottish Record Society are referred to by the surname of the notary concerned. The number of the protocol is given. The following additional abbreviations are used:—

Dunblane Acta: *Act Book of the Commissariat of Dunblane* (1550–5). Unpublished manuscript, H.M. General Register House, Edinburgh.

Formulare: Donaldson, G. and Macrae, C. (eds.). *St. Andrews Formulare*. 2 Vols. Stair Society, Edinburgh, 1942 and 1944. (References are to the number of the style.)

Liber: Innes, C. (ed.). *Liber Officialis Sancti Andree*. Abbotsford Club, Edinburgh, 1845.

S.A. Laud.: *Liber Sententiarum Officialis Sancti Andree infra Laudoniam* (1513–51). Unpublished manuscript, H.M. General Register House, Edinburgh.

S.A. Princ.: *Liber Sententiarum Officialis Sancti Andree Principalis* (1541–53). Unpublished manuscript, H.M. General Register House, Edinburgh.

Simon: Bain, J. and Rogers, C. (eds.). *Liber Protocolorum M. Cuthberti Simonis* (1499–1513). Grampian Club, London, 1875. (References are to the number of the protocol.)

Statutes: Patrick, D. (ed.). *Statutes of the Scottish Church*. Scottish History Society, Edinburgh, 1907.

Stirling: *Abstract of the Protocol Book of the Burgh of Stirling*, privately printed by T. & A. Constable, Edinburgh, 1896.

¹ *A.P.S.*, ii.534.

² Balfour, p. 655.

1567.³ These imply existing procedures which are modified or emphasised but which, essentially, are taken for granted. What was this system, and what is its relationship to the modern Scottish system of executry administration?

Development of the system of executry administration

From very early times executry matters were referred in Scotland to the courts spiritual. It is asserted in the *Regiam Majestatem* that actions relating to *dos* and wills pertain to ecclesiastical courts.⁴ But it is also said that, where a person unjustly detains a deceased's effects, a brieve may be obtained in these terms: "The King to the Sheriff, Greeting: We command you that justly and without delay you cause effect to be given to the reasonable will of N. as it can be reasonably shown that he made it and that it ought to receive effect."⁵ This brieve was copied from Glanvill and was possibly obsolete in England when the *Regiam Majestatem* was compiled.⁶ Whether it was ever used in Scotland is merely a matter for conjecture.⁷ A Provincial Council of the Church in Scotland held in the thirteenth century found it necessary to ordain collective excommunication against "all who raise obstacles against wills legally executed . . . as also those who hinder the ordinaries from administering in proper form the goods of those who die intestate according to the custom of the Scottish Church."⁸ This canon suggests the existence of a definite system for the administration of estates under the supervision of the Church, as does another canon forbidding members of religious orders exempt from the jurisdiction of the bishops to act as executors, on the narrative that a precise account should be rendered to the bishops regarding goods bequeathed by testament.⁹ The system continued to develop in the fourteenth century where, at least in the

³ Balfour, p. 662.

⁴ I.2.

⁵ II.38.4.

⁶ T. F. T. Plucknett, *A Concise History of the Common Law*, 4th ed. (London, 1948), p. 702.

⁷ It is perhaps significant that the brieve does not appear in the Ayr and Bute MSS.

⁸ *Statutes*, p. 26.

⁹ *Ibid.*, p. 17.

diocese of St. Andrews, parish priests and others were ordered to bring to the annual consistories lists of those who had died within their parishes, testate or intestate, so that the bishop might learn what effect was being given to the last wills of deceased persons.¹⁰

In 1420 a Declaration was made at Perth by another Provincial Council: “. . . the Lord Conservator requested that a declaration be made as to what custom was wont to be observed in the confirmation of testaments in times by-gone in the several dioceses. . . . And when they had all considered the matter, they unanimously declared that, from so far back that there is no memory of man to the contrary, bishops and those holding the jurisdiction of an ordinary have been wont to confirm the testaments and codicils of those who die testate in their respective sees and to appoint executors to those who die intestate; and further to cause to sequesterate the effects of deceased persons until their wills should have been presented to the ordinaries, and confirmed by them if lawful.”¹¹ In 1427 Parliament extended this jurisdiction by enacting that the testaments of all Scots dying abroad should be confirmed by their ordinaries in Scotland *non obstante quod quedam ex bonis hujusmodi decedentium tempore sui obitus fuerint in Anglia vel in partibus transmarinis*.¹² It seems clear that by the fifteenth century there had been developed a comprehensive system for the supervision of executors not peculiar to Scotland in the sense of not being paralleled elsewhere, but finding in Scotland special adaptation requiring its express extension to the Diocese of Orkney in 1549 and to that of the Isles (the Hebrides and Man) in 1551–52.¹³

Jurisdiction of the courts spiritual

Speaking of the position at the beginning of the sixteenth century Lord Clyde states that “the jurisdiction

¹⁰ *Ibid.*, p. 74.

¹² *A.P.S.*, ii.14.

¹¹ *Ibid.*, p. 81.

¹³ *Statutes*, pp. 115 and 137.

of the church courts in all matters which were then regarded as spiritual in character was a privative one.”¹⁴ This was certainly true of marriage, which was regarded as sacramental in character; but in other fields, for example, dowries and moveable succession, the position was more complex and the demarcation of the respective spheres of the spiritual and the secular courts imprecise. Most executry matters, however, were the exclusive preserve of the courts spiritual. They alone were competent to pronounce upon the validity of testaments and asserted appointments of executors-nominate. The best evidence would be to cite instances where the temporal courts had declined to make such determinations. These, unfortunately, are precisely the cases which are unlikely to be found in the surviving records of the late fifteenth and early sixteenth centuries. However, it will be found that the spiritual courts do, while the temporal courts do not, determine these matters.¹⁵ It was also a fundamental assumption of the legal system of medieval Scotland that the courts spiritual had the exclusive right to confirm executors, whether testamentary or dative, to remove them from office, and to superintend them in performance of their duties. The temporal courts do not deal with any of these matters, and the competence of the spiritual courts in regard to them is referred to or implicitly recognised in decisions of the temporal courts and in statutes of the Scottish Parliament.¹⁶ It is also thought that questions relating to the distribution of the dead's part were exclusively “spiritual.” In an action before the Lords of Council in 1498 one of the litigants claimed that part of the subject-matter of the dispute was “testit Gudis and aucht til be folowit and persewit before the spirituale juge,” and the plea was sustained.¹⁷ In the inferior courts similar arguments were

¹⁴ *A.D.C.*, III, p. xxxv.

¹⁵ *Regiam Majestatem*, I.2, II.38.5; Balfour, p. 28.c.xxvi; *Liber*, p. 125; *S.A. Princ.*, fos. 21 v, 177 v, 254.

¹⁶ *A.D.C.*, II, 444; 1503, c. 22; 1526, c. 15; 1540, c. 40.

¹⁷ *A.D.C.*, II, 178; cf. *A.D.C.*, I, 76, II, cxxix, 158, 494.

successful; in 1524 it was pleaded in the Barony Court of Carnwarth that a certain cow was "testit gere and awcht nocht to tholl law in this temperell court . . . and the haill court fand at it vas ane sufficient ansver that he suld ansver in the spirituall court."¹⁸ There is, however, a case where the Lords of Council granted decree against a deceased's widow in favour of his executors for delivery of the dead's part, the latter finding caution to the satisfaction of the Judge Ordinary Spiritual that the goods received should be liable for the debts of the deceased.¹⁹ Questions relating to the dues payable to the Church on death, such as mortuaries and quot, can have been of little interest to the secular courts and in practice were determined by the courts spiritual.²⁰ Even so we find the secular courts in one case dealing with an action for the delivery of an "umast claith."²¹

While it might be thought on *a priori* grounds that heirship moveables were a matter for the secular courts alone, and while these courts did entertain questions relating to heirship moveables,²² the courts spiritual did not decline jurisdiction in actions for their delivery.²³ There are several other matters which cannot be assigned with certainty to the exclusive competence either of the secular or of the spiritual courts. Balfour says, for example, "Gif ony man, as executor, persewis an uther for ane debt awand be him to him that is deceissit, he aucht and suld persew the same befor the Juge ecclesiasticall, and not befor the Lordis of counsall, quha in na wayis are Jugeis competent, 6th June, 1498. Patrik Gray contra the Erle of Crauford."²⁴ This case, which was an incidental skirmish in a series of legal battles between the parties, is not an entirely

¹⁸ W. C. Dickinson (ed.). *Court Book of the Barony of Carnwarth*, Scottish History Society (Edinburgh, 1937), p. 19; cf. Ros, 1208.

¹⁹ *A.D.C.*, I, 219.

²⁰ *Liber*, pp. 119, 127, 128; *S.A. Princ.*, fo. 32v; *S.A. Laud.*, *Fragments*, fo. 3; *Dunblane Acta*, fos. 301 v, 303, 367, 376.

²¹ *Acta Aud.*, 148.

²² *A.D.C.*, I, 165; II, cxxix, 402.

²³ *S.A. Laud.*, fos. 217, 256v.

²⁴ Balfour, p. 29.

satisfactory authority for the proposition.²⁵ The courts spiritual entertained such actions; but there are cases where executors, even the executors of bishops, pursued debtors of the deceased in the civil courts.²⁶ Styles of confirmation then current included express power to the executors to raise actions before any judges whomsoever, ecclesiastical or secular.²⁷ In the converse case, where executors were sued for payment of the deceased's debts, it is thought that, at any rate in principle, the spiritual courts had exclusive jurisdiction. There are approximately fifty decrees involving executors in the first thirty folios alone of the *Liber Sententiarum Officialis Sancti Andree infra Laudoniam*. The majority of these appear to have decided actions in which executors were sued by creditors of persons deceased. Actions for payments of bairn's part of goods were normally disposed of by the courts spiritual.²⁸ It seems likely, however, that the secular courts were also competent in this matter.²⁹ Actions relating to the widow's part appear to have been in the same position.³⁰

The jurisdiction assumed by the ecclesiastical court in executry matters does not appear to have precluded the reference of disputes to *ad hoc* arbiters. In the *Stirling Protocol Book* there is an entry in these terms: "1476. Ultimo Marcii. David Broys of Clakmanan on the one part, James Schaw of Salchy, Robert Schaw of Munktown, and Agnes Bros agree to abide at the decreet of Thomas Broys and others anent an action testamentary, etc."³¹ Elsewhere, in a dispute as to the division of a deceased wife's estate her husband and daughter submit a dispute to arbitration to "cut out of the windings of the law"—*litium unfractis amputare*.³²

²⁵ *A.D.C.*, II, 253.

²⁶ *A.D.C.*, I, 214, 247; II, 282, 443, 444, 483.

²⁷ *Formulare*, I, 72; II, 422; Simon, 132.

²⁸ *S.A. Princ.*, fos. 23, 67v, 116, 163, 168v, 207v; *S.A. Laud.*, fos. 298v, 302v.

²⁹ *A.D.C.*, II, 179, 374; *Bisset*, II, 92.

³⁰ *Bisset*, *loc. cit.*

³¹ *Stirling*, p. 28.

³² Christisone, 133; *cf. Stirling*, pp. 14, 21; Christisone, 140, 218, 324, 338; Simon, 283; Johnoun, 366; *Liber actorum Officialis S. Andree infra Laudoniam* (1551-1553). Unpublished manuscript, H.M. General Register House, Edinburgh, fos. 113v, 118.

Appointment of the Executors

Executors were normally appointed by will. The medieval Scottish will is an extremely interesting document and deserves separate discussion. It suffices to say that the man in the street bequeathes his soul to God and to a representative selection of the citizens of heaven, and his body to be buried in a particular church; he appoints A and B to be his executors, B to be the sole intromitter with his goods, and C to be their oversman to give them counsel when they require it; he bequeathes his gown to a friend and five shillings to the fabric to his church; the rest of his goods he directs his executors to dispoise upon for the safety of his soul. It is apparent that the appointment of executors is the main feature of the will, which often contains little else of substance.³³

There were no special restrictions on the appointment of women as executors and the testator's widow was undoubtedly the preferred executor. The capacity of minors is uncertain. As mentioned above, members of exempt religious orders, such as the Cistercians, were not permitted to act as executors. Executors-nominate were at liberty to decline office provided that they had not intromitted with the goods of the deceased.³⁴ Numerous instruments of declinature and renunciation survive in the protocol books.³⁵ In one such instrument the nominated executor makes allusion to the fact that *ad ipsum officium acceptandum non esset obligatus, sed esset mere voluntarium*.³⁶ In another he declares that he has not intromitted with the goods of the defunct.³⁷ The precise scope of the duties of the oversman of the executors is not clear. In one will the oversmen are appointed to give the executors

³³ e.g., Simon, 35, 219, 650.

³⁴ Balfour, p. 221, c. xiii. The rule that executors might not resign after intromission was based on the *Decretals*, III.26.19, and the relevant passage is underlined in a copy of the *Decretals* which is thought to have been in the possession of the commissaries at Aberdeen.

³⁵ e.g., Simon, 241, 469, 527, 530, 645; Ros, 111, 589; Johnstoun, 376.

³⁶ Simon, 527.

³⁷ Ros, 589.

counsel when they require it, but with no other authority over them.³⁸ Elsewhere an oversman is to be found joining with the other executors in raising an action.³⁹

If the deceased died intestate it was the duty of the Official to appoint executors-dative.⁴⁰ Executors-dative were appointed when the deceased died partially intestate to the extent of the intestacy, and when the executors-nominate failed to carry out their duties.⁴¹ Executors-dative might also be appointed where all the executors-nominate declined office. In Scotland this does not appear to have entailed the distribution of the deceased's estate as for an intestacy. On the contrary, an appointment of executors-dative in such circumstances by Archbishop Forman directs the distribution of the deceased's estate in accordance with the tenor of the will.⁴² The question who had right to be appointed executor-dative is of some interest because its historical investigation might throw light on the origin of the Scottish rules relating to intestate moveable succession. Here it is enough to say that, as early as the thirteenth century, the bishops supervised the distribution of intestate estates.⁴³ The Declaration of 1420 states that the ordinaries had been used "to appoint executors to those who die intestate."⁴⁴ Whether their choice was unfettered is not clear, but they were probably bound by custom to appoint the next-of-kin. In the sixteenth century persons were appointed executors-dative *tanquam propinquiores ex sanguine*⁴⁵ and *tanquam fratrem germanum unicum superstitem dicti quondam Davidis ut propinquiorem agnatum ejusdem*.⁴⁶ A person unsuccessfully petitioned to be

³⁸ Simon, 249.

³⁹ *S.A. Princ.*, fo. 60v.

⁴⁰ *Statutes*, p. 177; *Formulare*, I, 72; *Liber*, p. 132.

⁴¹ *Statutes*, p. 116; *Formulare*, I, 166, 259.

⁴² *Formulare*, I, 166.

⁴³ *Statutes*, pp. 25, 26, 46; *A.P.S.*, i.752.

⁴⁴ *Statutes*, p. 81.

⁴⁵ *S.A. Princ.*, fo. 225; Testament-dative of Catherine Stewart dated October 16, 1559, referred to in manuscript *Inventory of Morton Papers*, H.M. General Register House, Edinburgh, p. 267.

⁴⁶ *S.A. Princ.*, fo. 204.

appointed in room of executors-nominate *tanquam avunculum et propinquiorem cognatum*.⁴⁷ These averments clearly reflect the existence of defined legal principles whose contravention by an ordinary would evoke immediate protest.⁴⁸ A Statute of a Provincial Council of 1559 forbade ordinaries to assign to themselves or others any part of the estates of intestates with the exception of the quot, and ordained the appointment as executors-dative of such of the nearer kinsmen of the deceased who, in the judgment of the ordinary, were specially well qualified for the office. To this end it was declared that no executor-dative should be appointed without public citation of persons interested on fifteen days notice.⁴⁹ It is apparent from its context that this statute was promulgated to correct abuses rather than to enact new law.

The Inventory

The first duty of executors accepting office was to draw up an inventory of the deceased's estate with a view to obtaining confirmation. No one might intromit with the estate before confirmation.⁵⁰ An Act survives recording the citation of a person intromitting with a defunct's estate to hear himself excommunicated because of his "unjust intromission with the deceased's goods before confirmation of his testament," or to show cause to the contrary.⁵¹ The unconfirmed intromitter had no title to sue the debtors of the deceased and was personally liable to the deceased's creditors beyond the value of the estate. Many surviving documents point to the Church's anxiety that confirmation should be obtained as soon as possible after death. The protection of beneficiaries was doubtless the primary motive, but there was also the secondary and less altruistic object of securing payment of the quot. A diocesan constitution of

⁴⁷ *S.A. Princ.*, fo. 249.

⁴⁸ Cf. Simon, 290.

⁴⁹ *Statutes*, p. 177.

⁵⁰ *Formulare*, I, 224; Balfour, p. 219, c. iv, citing a case of May 25, 1549; *Instructions* of 1563, para. 30.

⁵¹ *Dunblane Acta*, fo. 421v.

Andrew Forman, Archbishop of St. Andrews from 1516 to 1521, instructed parish clergy to list the names of persons dying within their parishes, and to record details of whether or not confirmation had been granted.⁵² He also ordained that inventories should be produced within nine days of the date of death, failing which executors-dative would be appointed.⁵³ In England it became the practice to commit the administration of the testator's estate to the executors *before* the inventory had been drawn up and approved.⁵⁴ There is no evidence of a similar practice in Scotland.

In medieval Scotland the inventory was hardly less important than it is today. The testator in his lifetime might himself prepare an inventory of his assets and liabilities to accompany his testament.⁵⁵ But this was not always done and a testament survives in which the testator admonishes his executors to make a "leil inventour" of all his goods and debts.^{55a} It was a simple document, generally in the following form: *Inventarium omnium bonorum quondam A.B. infra diocesum Sanctiandree existentium factum apud Dalkeith decimo die mensis Maii Anno Domini Millesimo quingentesimo secundo coram hiis testibus D.E., E.G., . . . cum diversis aliis.* A detailed list of the deceased's corporeal moveables followed: *In primis fatetur se habere in Dalkeith xxxii boves arabiles.* . . . Next might come a list of the deceased's incorporeal assets, and in this way the sum of the gross moveable estate was ascertained. A list of the debts followed which, summed and deducted from the gross moveable estate, brought out the *Summa omnium bonorum debitis extractis.*

⁵² *Statutes*, p. 265.

⁵³ *Statutes*, p. 281; *Formulare*, I, 203, 224, 259; II, 422.

⁵⁴ E. F. Jacob (ed.). *Register of Henry Chichele*, 1414-1443, Canterbury and York Society (Oxford, 1937), Vol. II, p. xxx.

⁵⁵ *The Bannatyne Miscellany*, Bannatyne Club (Edinburgh, 1855), Vol. III, p. 93; Joseph Robertson (ed.). *Antiquities of the Shires of Aberdeen and Banff*, Spalding Club (Aberdeen, 1862), Vol. IV, p. 98.

^{55a} *Young*, 1242.

Finally, a calculation of the *pars defuncti* and the quot might, but did not necessarily, follow.⁵⁶

A statute of 1551 ordained that no confirmations should be granted *ad intus et extra* and that "the several items requiring to be confirmed be specifically expressed and comprised in the inventories of the goods, but not as 'under or above a general total.'"⁵⁷ This can hardly have been a new rule seeing that confirmation *ad omissa* was a common procedure long before 1551. On the other hand, even after 1551, the rule was not always observed.⁵⁸ The classes of persons who were interested in the accuracy of the inventory are indicated by a notarial instrument in which the curate of the parish church of Linlithgow protested that an inventory was not just and accurate and was to the prejudice of the Dean for his quot, and of the creditors, legatees and others having interest, and craved that confirmation should not be granted without his consent.⁵⁹ Normally, however, the intervention was on the part of persons interested in the succession. If executors-nominate did not make an accurate inventory, other persons, possibly preferentially those who on an intestacy would have been entitled to be appointed executors-dative, could apply for appointment as executors-dative *ad omissa* or *ad male apprehiata*.⁶⁰

With the inventory, the deceased's testament was presented for registration. A synodal constitution of Andrew Forman, Archbishop of St. Andrews from 1516 to 1521, "enjoins, as at various past synods he has enjoined, on all and sundry his deans that henceforth and in future they accurately and faithfully register in one book proper

⁵⁶ Based on Testament-testamentar of George Douglas, referred to in manuscript *Inventory of Morton Papers*, p. 267; cf. Registers of Testaments for Glasgow, Dunblane and Fife, H.M. General Register House, Edinburgh.

⁵⁷ *Statutes*, p. 137.

⁵⁸ J. Robertson (ed.). *Statuta Ecclesiae Scoticanæ*, Bannatyne Club (Edinburgh, 1866), Vol. II, p. 297; Testament-testamentar of George Douglas, *supra*.

⁵⁹ Johnsoun, 343.

⁶⁰ R. K. Hannay (ed.). *Rentale Sancti Andree*, Scottish History Society (Edinburgh, 1915), pp. 46, 47, 207. *S.A. Princ.*, fos. 218v. 225, 250v; *S.A. Laud.*, fos. 31v, and 189v; cf. *Instructions of 1563*, para. 32.

for the purpose all wills that involve confirmation on their part in virtue of their offices.”⁶¹ The same constitution fixed fees for registration and these had to be paid along with the quot at the time of confirmation.

Confirmation of the executors

The power to grant confirmation was vested in the bishop of the diocese in which the deceased had been domiciled. This principle was invoked by the executor-nominate of an ecclesiastic who died domiciled in the Diocese of Glasgow to contest the jurisdiction of the Official of Lothian.⁶² Elsewhere Archbishop Forman may be found insisting on his rights in a case where a subject vicar of the see of St. Andrews died within the diocese of Brechin. The Bishop of Brechin was requested to order the executors not to intromit with the estate until an inventory had been presented and the quot paid at St. Andrews.⁶³ The jurisdiction appears to have been limited to goods situated within the diocese.⁶⁴ As mentioned above the case of a Scot dying abroad was regulated by statute, and a style of testament-dative given in such circumstances is contained in the *St. Andrews Formulare*.⁶⁵ In medieval England a prerogative jurisdiction was claimed by the Archbishops where *defunctus bona notabilia habuit in diversis diocesis-bus*.⁶⁶ There is no trace of an analogous jurisdiction in Scotland. The tendency in Scotland was against centralisation. While the bishops normally reserved to themselves the confirmation of “greater estates,” that is, those in which the dead’s part after deduction of the debts exceeded £40 Scots, they delegated the confirmation of “lesser estates” to the rural deans, who accounted at the synods for the quot received.⁶⁷

⁶¹ *Statutes*, p. 265.

⁶² *Formulare*, I, 294.

⁶³ *Formulare*, I, 224.

⁶⁴ See heading of form of inventory given above, which is standard. The same phraseology appears elsewhere: e.g., *Formulare*, I, 72; *S.A. Princ.*, fo. 69v.

⁶⁵ I, 72.

⁶⁶ *Register of Henry Chichele*, Vol. ii, p. ix *et seq.*

⁶⁷ *Formulare*, I, 16, 187; *Liber*, p. 126; *Statutes*, p. 137; Simon, 298; *Rentale Sancti Andree*, *supra*, *passim*; R. K. Hannay (ed.), *Rentale Dunkeldense*, Scottish History Society (Edinburgh, 1915), pp. 9-24.

The usual style of confirmation granted to executors-nominate in the diocese of St. Andrews was as follows:—*Nos Joannes miseratione divina Sanctiandree Archiepiscopus . . . hoc superscriptum testamentum et bonorum inventarium ac executores in eodem nominatos, ipsis liberam bonorum hujusmodi committendo administrationem ac recepto ab eis primitus juramento solito et consueto de fideliter in officio executorie administrando et compoto nobis et commissariis nostris cum ad hoc legitime fuerint vocati reddendo ut moris est, in quantum rite et legitime factum est, quoad bona hic superius descripta ad infra et extra contenta duntaxat, auctoritate nostra ordinaria approbamus ratificamus (sic) et tenore presentium confirmamus. In cujus rei testimonium. . .*⁶⁸ The confirmation of an executor-dative was somewhat more elaborate in form and appears to have been a development of the usual form of decree given in disputed cases before the spiritual courts.⁶⁹ A fuller form of confirmation of executors-nominate was apparently in use in the Diocese of Glasgow.⁷⁰

Several features of the confirmation are of interest. First, there is the reference to the fact that the testament-testamentar contained in addition to a copy of the inventory a copy of the deceased's will. Secondly, the taking of the oath *de fideli* is mentioned. The Declaration made by the Provincial Council of 1420, already referred to, continued: " . . . they have been wont to require all executors both of persons leaving their wills and of persons dying intestate to take the oath *de fideli*, further to swear that they will faithfully perform as far as in them lies all the reasonable intentions of the deceased." ⁷¹ Thirdly, while the deed confirms the will, inventory, and appointment of executors, it only does so in *quantum rite et legitime factum est*. In other words, like the modern Scottish confirmation, it was

⁶⁸ Testament-testamentar of George Douglas, *supra*; a similar form is contained in the *St. Andrew Formulare* and is printed in *The Archbishops of St. Andrews*, by John Herkless and Robert Kerr Hannay (Edinburgh, 1909), Vol. II, p. 247.

⁶⁹ *Formulare*, I, 72, 166, 259; Testament-dative of Catherine Stewart, above.

⁷⁰ Simon, 132.

⁷¹ *Statutes*, p. 81; *cf. ibid.*, p. 115.

not a final determination of the validity of the will produced. A decree survives in which William Prestoun, the Official of Lothian, declared to be void and forged a will confirmed by his predecessor.⁷² Fourthly, it is thought that the phrase *ad infra et extra* must have the same meaning as the phrase *ad intus et extra* appearing in the Statute of 1551. Since this confirmation bears to have been granted in 1554, it is an interesting comment on the observation of the Statute. Finally, the administration of the estate is committed to the executors who at the end of it have to account for their intromissions. These duties of the executors must now be considered.

Ingathering the estate

Some styles of confirmation expressly empowered the executors to recover any portion of the deceased's estate from persons intromitting with it and to grant receipts.⁷³ When this power was not expressly conferred it must have been implied. Executors had to take every appropriate step to recover debts, including the raising of actions. Sir Thomas Craig, writing about 1603, tells us that, if executors did not bring suit within a year, they could not plead in answer to a creditor of the estate that the debts were irrecoverable.⁷⁴ This rule may well have been derived from the practice of the courts spiritual.

During their year of administration the executors were liable *primo loco* for the ancestors' moveable debts. Thus, in a case heard before the Lords in Council in 1488, an heir, sued for payment of a moveable debt, raised the exception that the executors had goods enough to meet the liabilities of the estate. The Lords referred the matter to the Spiritual Judge Ordinary to be decided by him.⁷⁵ The heir might be sued only if the debt was charged upon heritage or if the moveables were insufficient.⁷⁶ When,

⁷² *Liber*, p. 126; cf. *S.A. Princ.*, fo. 254.

⁷³ *Formulare*, I, 72, and II, 422; Simon, 132.

⁷⁴ *Jus Feudale*, 2.17.16.

⁷⁵ *A.D.C.*, I, 103.

⁷⁶ *A.D.C.*, I, 117, 182, 279, 291, 358, 367.

after the lapse of their year of administration, executors had been discharged they were not bound to answer the claims of creditors.⁷⁷ If the creditors then turned to the heir, he might still raise the exception that, since the debt was a moveable one, it was the liability of the executors and not of himself. To meet this situation the Act of 1503, c. 22,⁷⁸ declared this exception to be incompetent, but enjoined the heir to require the ordinary to exact caution from the executors at the count and reckoning for the "relieving of his heritage in so far as the goods rest attour the compt."⁷⁹

If the deceased died during the dependence of an action, the confirmation itself was insufficient title for the executors to continue it, and an action of transference was necessary.⁸⁰ In the converse case, also, a creditor had to bring an action of transference against the executors.⁸¹ An action of transference, similarly, was necessary to vest executors in sums acted in the books of the courts spiritual.⁸² Conversely, where the deceased's liability was constituted by an act, *causae translationis* were used to establish the passive liability of his executors.⁸³ The Roman *translatio iudicii successoria* was almost certainly the source of these actions of transference.⁸⁴ Since the latter passed into the procedure of the Commissary Courts and the Scottish law of procedure generally, this would seem to be a clear example of Roman law penetrating into Scots law through the medium of the medieval courts spiritual.

It is probable that, unless a debt had been specifically acknowledged by the deceased in his testament, the executors were unsafe to pay it until it had been constituted by decree against them. Thus Cardinal Betoun instructed

⁷⁷ See below.

⁷⁸ *A.P.S.*, ii, 243.

⁷⁹ *Cf. Formulare*, I, 70.

⁸⁰ *Stair*, IV. 34.1. The need for "transferrings activé" was dispensed with by the Act, 1693, c. 24.

⁸¹ *S.A. Princ.*, fos. 113, 175; *Dunblane Acta*, fos. 321v, 413.

⁸² *S.A. Princ.*, fos. 75v, 97v, 105, 133, 240.

⁸³ *S.A. Princ.*, fos. 193, 199, 223; *S.A. Laud.*, fo. 302v; *Dunblane Acta*, fo. 56v.

⁸⁴ I am indebted for this suggestion to Professor D. Daube.

executors-dative to pay the deceased's debts "*cum tamen debita hujusmodi coram iudice competenti prius liquidata fuerint.*"⁸⁵ This would explain the frequency of decrees against executors in the *Liber Sententiarum Officialis Sancti Andree infra Laudoniam*. The surviving records of the spiritual courts do not make it clear whether, in the case of insolvent estates, executors were bound to pay debts constituted by decree without reference to the adequacy of the estate to meet other known debts,⁸⁶ or whether some equitable rule operated.⁸⁷

Satisfaction of legal rights

The next duties of executors were dictated by the law of succession. If the deceased left heritage, and only if he did, the heirship moveables had to be transferred to the heir. In theory it is possible that the "sasine" of the executors did not extend to these goods, which were not appropriate items for inclusion in the inventory. However, executors very often did have *de facto* possession of these goods, and, because of the difficulty of ascertaining what precisely was due to the heir, became involved in litigation as a consequence.⁸⁸ Craig says that in his time heirship moveables which were in pledge at the time of the deceased's death had, if selected by the heir, to be redeemed by the executors at the expense of the moveables.⁸⁹ The legal rights of spouses and children had also to be met. The Declaration of 1420 refers to the division of "the personal effects of the deceased into three equal portions, whereof, the debts first being paid, if there were wife and children, the wife was in use to have one third of the moveable goods, and the children another third."⁹⁰ Thus the executors of a certain David Russell deceased are decerned to pay to his son £41 5s. Scots

⁸⁵ *Formulare*, II, 422; cf. *Formulare*, I, 72.

⁸⁶ See *Jus Feudale*, 2.17.15; Stair, III.8.66.

⁸⁷ See Spotiswoode's *Practicks*, p. 121.

⁸⁸ Simon, 220; Grote, 213; *A.D.C.*, I, 165; *A.D.C.*, II, cxxix, 145, 470; *A.D.C.*, III, No. 77; *S.A. Laud.*, fos. 217, 256v.

⁸⁹ *Jus Feudale*, 2.17.7.

⁹⁰ *Statutes*, p. 81.

“ *pro portione sua puerili, videlicet tertia parte bonorum dicti quondam David defuncti sui patris, sibi jure naturae et ex consuetudine regni spectante tanquam proli defuncti minime per eundem forisfamiliato.*”⁹¹ Medieval executors were very frequently appointed tutors to the testator’s infant children,⁹² and one of their most difficult tasks must have been the application of the legitim to the advantage of the children. The whole, or part of it, might be paid to the widow for the children’s maintenance.⁹³ It might be paid away as a premium for an apprenticeship.⁹⁴ Another solution was to allow the executors to retain the legitim in their own hands finding, however, caution in the books of the courts spiritual that they would make the shares of the children furthcoming to them.⁹⁵

Disposal of the dead’s part

When legal rights had been satisfied, there remained the dead’s part, which was peculiarly the province of medieval executors and the interest of the medieval Church. The Declaration of 1420 continued : “ and of the third part which remained the executors were wont to dispose for funeral expenses and the soul of the deceased and in payment of legacies : and out of this third, or dead’s part, the executors were wont to pay twelve pence per pound to the ordinaries for the confirmation of the testament and services connected therewith, or at least to compound with them for the same.”⁹⁶ The deathbed and funeral expenses included payments for services in the deceased’s last illness and on the day of the funeral,⁹⁷ and the delivery of mortuaries to the parish priest. The precise form which mortuaries took seems to have depended upon local custom,⁹⁸ but the terms applied to them, “ kirk coo ” and “ umast claith ” describe

⁹¹ *S.A. Princ.*, fo. 168v.

⁹² Simon, 35; Young, 1243; Gaw, 105; *Stirling*, p. 7.

⁹³ Cristisone, 383; see also Johnsson, 248.

⁹⁴ Gaw, 65; Fleming, 1101.

⁹⁵ *S.A. Princ.*, fo. 210v.; *S.A. Laud.*, fo. 302v.

⁹⁶ *Statutes*, p. 81.

⁹⁷ *S.A. Princ.*, fos. 12, 69v.

⁹⁸ Simon, 64, 65.

what was usually taken.⁹⁹ Several decrees and acts of the courts spiritual are concerned with mortuaries and in one case an executor argued, with what success it is not clear, that he was not liable for their delivery because the deceased's debts exceeded her assets.¹ The Church also claimed payment of the quot. It is sometimes said that the quot was a charge on the whole moveable estate *deductis debitis*.² It seems unlikely, however, that, prior to 1560, the charge was levied on the *whole* moveables in view of the terms of the Declaration of 1420, in view of various inventories where the *pars defuncti* was calculated,³ and in view of the amounts of quot received by the Chamberlain of St. Andrews for the confirmation of "greater" testaments. If the quot had been levied on the whole moveable estate, the minimum quot shown in the Chamberlain's accounts should have been £6, whereas, apart from one or two exceptional lower amounts, the minimum quot received was £2.⁴ Certainly the view that the quot was levied upon the dead's part, which might be one-third, one-half, or even the whole estate, seems more in keeping with the surviving evidence.

Out of the dead's part the executors had also to pay the legacies,⁵ and that even if it meant exhausting the estate. In *Wilson v. Lord Tinto* ⁶ it was said that the Act of 1617, c. 14, "puts not the executors in better case than wherein they were before that Act; and before that Act, when the

⁹⁹ For details see Dr. Robertson's *Statuta Ecclesiae Scoticanæ*, Vol. II, pp. 273, 305. The topic of *jure funeralia* in Scotland is fully discussed in a contemporary manuscript, the manuscript Lectures of William Hay of Aberdeen (Aberdeen University MS., No. 239, folio 33v. ff.). It is understood that the manuscript, which contains also an extremely interesting exposition of early Scottish matrimonial law, is being edited with a view to publication by the Rev. J.C. Barry, St. Andrews College, Melrose.

¹ *Dunblane Acta*, fo. 376; cf. *Liber*, pp. 119, 127, 128; *S.A. Princ.*, fos. 12, 32v; *Dunblane Acta*, fos. 301, 303.

² *Rentale Sancti Andree*, *supra*, p. xxxv.

³ e.g., *Dunblane Register of Testaments*, Vol. I, fo. 7; Testament-testamentar of George Douglas, above, where a calculation of the quot follows.

⁴ *Rentale Sancti Andree*, *supra*, *passim*.

⁵ *S.A. Princ.*, fos. 20v, 21, 23, 24v, 47, 58, etc.

⁶ Mor. 8924.

defunct left his whole goods in legacy, the executor then could have no part thereof."

Stair tells us that the dead's part was "seldom considerable" ⁷ and in the ordinary case very little can have remained after satisfaction of legal rights and payment of the debts, funeral expenses, quot and legacies. But some might remain where the estate was large or where the deceased had died unmarried and childless. Regrettably little evidence remains as to how it was disposed and the following remarks are conjectures which may be displaced by the discovery of additional material. Considering first the position arising upon intestacy it is found that one particular case is regulated by statute. The Act of 1526, c. 15, re-enacted by the Act of 1540, c. 40, ⁸ referred to the fact that in the case of young persons dying intestate the ordinaries had been accustomed to appoint executors-dative but that these might withdraw the estate "fra the kynnys folk and freyndis that suld have the same be the law." It was therefore enacted that the nearest of kin should have the estate without prejudice to the ordinary's right to the quot. The point of interest is that the preamble explicitly affirms that, *before* the Act, "the kynnys folk and freyndis," that is to say the next-of-kin and relations, had an interest in the estate recognised by law. It seems *prima facie* unlikely that a right of this kind vested in next-of-kin was confined to the estates of minor relatives. On the contrary, it is thought that, in any case of intestacy, the next-of-kin had a legal interest in the estate. Originally, this interest was probably not confined to the right to the office of executor-dative, but in time the right to the office and the rights in the estate tended to become confused. A style of confirmation of executors-dative in the St. Andrews Formulare specifically instructs the executors to pay the debts and intromit with the estate, *ac alias pro salute anime dicti quondam D et in alios bonos et pios usus prout prefato*

⁷ III, 8.29.

⁸ *A.P.S.*, ii, 306 and 377.

executori dativi videbitur expediens et opportunum disponendi.⁹ It may be asked how this benefited the next-of-kin. The answer to this depends on the meaning of the phrase *in pios usus*. John Selden, speaking of an English diocesan constitution of 1258, says: "Here we see plainly that the distribution *in pios usus* was the devising of them among the next-of-kin, according to their nearness and want, not employing them to other uses, at the ordinary's arbitrary disposition."¹⁰ No doubt some part of the residue would go to the Church "*pro pulsatione campanorum*" and for prayers for the repose of the deceased's soul.¹¹ But it seems clear that in sixteenth-century Scotland distribution *in pios usus* did not mean handing over the main part of the residue to the Church. If it had meant this it is strange that no traces survive in the ecclesiastical accounts nor in the numerous decrees of exoneration contained, for example, in the *Liber Officialis Sancti Andree Principalis*. It would have been a burden far more serious than the mortuaries which attracted so much notice during the course of the Reformation. Yet there are no references to it. Legal styles are notoriously conservative and it is likely that the phrase *in pios usus* was retained long after it had lost its original meaning. A hint of its true significance has slipped into at least one style where executors-dative are ordained to apply *bona sua (debitis hujusmodi solutis) super-excrementia ad utilitatem prolium suarum ac alios in pios usus pro animarum suarum salute*.¹² It hardly seems possible that in this context the phrase was ever taken literally. Lip-service was possibly paid to the ideal and in medieval times it was considered that charitable gifts to the poor, especially needy relatives, conduced to the good of the deceased's soul: *Eleemosyna extinguit peccata*. What at

⁹ *Formulare*, II, 422; cf. *Formulare*, I, 72.

¹⁰ *Opera Omnia*, Vol. iii, col. 1680. For a fuller discussion of the meaning of the term see G. Lyndwood, *Provinciale* (Oxford, 1679), p. 180, gl. ad verb. *pias causas*.

¹¹ *S.A. Princ.*, fo. 69v.

¹² *Formulare*, I, 72, footnote,

first was possibly just a moral obligation to relatives crystallised out into a customary rule. Simultaneously, another customary rule developed: that the next-of-kin had right to the office of executor-dative. In this position their power of disposition was discretionary and they themselves were in the class which had a customary right to benefit. Why should they not exercise their discretion in their own favour? From here it is a short step to say that executors, as such, and not the next-of-kin, had a proprietary interest in the balance of the dead's part. This was probably never admitted by the ecclesiastical lawyers, but it was certainly true by 1617.¹³

What was the position where the deceased died testate? If any of the dead's part remained it was to be disposed in accordance with the deceased's expressed wishes. But very often these were simply that the residue should be applied for the good of the deceased's soul. Directions to this effect are one of the characteristic features of the medieval Scottish will.¹⁴ A typical provision is contained in the Testament of Alexander de Suthyrland of Dunbeath dated November 15, 1456: "The lave of al my gudis expremyt in my Testament, that I have nocht disponyt upon, I put in the disposicioun of myn Executouris . . . that they dispoone upon the forsaid gudis as they will answer before the Hee Juge on the Day of Doum."¹⁵ It is implied in this Testament, as it is expressly stated in others, that the residue should be applied *in pios usus*. In this context the meaning of the phrase appears to have undergone an evolution similar to that described above.

Discharge of the executors

It seems likely that executors in medieval Scotland were expected to complete their administration within one year of the date of confirmation.¹⁶ There were similar rules in

¹³ Act of 1617, c. 14, *A.P.S.* iv, 545

¹⁴ Simon, 219, 650, 651; Young, 1243; Gaw, 109, etc.

¹⁵ *The Bannatyne Miscellany*, *supra*, Vol. III, p. 93.

¹⁶ *Statutes*, p. 177; *Formulare*, I, 68, 70, 71, 177, 187; Balfour, p. 219, c. iii, p. 230, c. xxviii; Act of 1503, c. 22.

England, in the *pays de coutumes* of France, and in the Canon law.¹⁷ At the end of this period the executors were expected to give an account of their administration. It is thought that in the normal case the process of exoneration was initiated by the executors themselves when they applied for their discharge.¹⁸ But, if they failed to make application, the ordinary might initiate the count and reckoning *ex proprio motu* through his procurator-fiscal¹⁹ "to the effect" it was said, "that the issue should not be defrauded of the portions that fell to them as children, and that the pious wishes of the deceased and their bequests be respectively carried out and discharged."²⁰ So that appropriate cases for intervention should not escape the notice of the fiscal, officials who maintained registers of testaments were ordained to produce them at stated times.²¹

If the proceedings for count and reckoning were on the initiative of the procurator-fiscal the usual modes of citation in office causes were adopted.²² If at the instance of a private individual, he obtained letters citing individuals specially named and all and sundry having interest to compare, for example, twenty-one days from the date of citation in the consistory of the church of Glasgow to see and hear the executors of A.B. make count and reckoning respecting his goods, gear, debts and testament and, on such count and reckoning having been made and admitted, to be discharged from the said office of executry or to show reasonable cause why this should not be done. The letters of citation were published generally by affixation to the doors of the parish church.²³ Certain individuals might be personally cited and the prudent executor took instruments on the fact of citation.²⁴ Proceedings on the day appointed are illustrated in a document in which authority is given to three

¹⁷ *Register of Henry Chichele*, *supra*, Vol. ii, p. xxxii; Andre Perraud, *Le Testament*, p. 139; *Decretals*, III.26.3.

¹⁸ *Dunblane Acta*, fo. 187v.

¹⁹ *Cf. Formulare*, I, 68, 70; *S.A. Princ.*, fo. 192.

²⁰ *Statutes*, p. 266.

²¹ *Statutes*, pp. 137, 265.

²³ Simon, 553.

²² *Cf. Formulare*, I, 68, 70.

²⁴ Ros, 500; Simon, 553.

commissaries to call before them executors already summoned and others having an interest to hear the count and reckoning. The commissaries are given power to administer oaths, to receive the accounts, to cite and examine witness necessary for their verification, to receive in evidence decrees, writs and other documents, and, if they are satisfied, to exoner and discharge the executors.²⁵ Further light is thrown on the subject by a discharge which narrates the petition of the executors for their exoneration, the citation of parties having an interest, the compearance of the executors in court, and production of the letters of citation and their executions, the formal calling of the creditors and legatees of the deceased and others interested, the appearance of creditors who protested that the executors should not be discharged until certain sums still resting owing had been paid, and the appearance of the heir-at-law who protested that a discharge should not be granted until all the creditors and legatees had been paid in full.²⁶ The operative part of the discharge follows in which, after a narrative of the process of count and reckoning, the ordinary imposed perpetual silence on parties not appearing and, saving the rights of the parties protesting, discharged the executors, declaring them to be free from any other court proceedings in respect of their administration.²⁷ The procedure of count and reckoning was taken over by the commissaries but gradually fell into desuetude. Stair refers to it in these terms: "The old custom was, that the executors behoved to get exoneration before the commissaries, calling the creditors and all having interest, and counting to them. And it was not relevant to allege exhausting by exception, but there behoved to be a decret of exoneration obtained, which is the only full and general liberation."²⁸

* * * *

²⁵ *Formulare*, I, 69.

²⁶ Cf. Act of 1503, c. 22 referred to above.

²⁷ *Formulare*, I, 70; see also *Formulare*, I, 71; Ros, 896; Balfour, p. 221, c. xi.

²⁸ III.8.75.

From what materials did the medieval ecclesiastics build up their system of executry administration? The substance obviously did not come from Roman law, although it was quarried for incidental rules. Stair commences his discussion of executry with a long description of the Roman rules, but only to contrast these with the rules of Scots law, which has “reduced the matter of testament and succession in moveables much nearer to natural equity and made it much shorter and plainer than the Roman law.”²⁹ Roman law, he points out, laid greatest stress on the free power of testing, but not so Scots law, which not only permits conventional restrictions on this power but declares that nothing is testable but moveables, and of these only the dead’s part.³⁰ Roman law did not even know our distinction between heritage and moveables. Stair goes on to say: “The whole interest of executry with us, is in the office of executor,—the division of the communion of goods betwixt man and wife (whereby the relict hath her part),—the succession of children or nearest of kin,—and legacies; for albeit the nomination of executors be in the defunct’s power, in the first place, and doth resemble the institution of heirs . . . ; yet it is not properly a succession, but rather an office, which therefore hath a part of the goods consequent thereto, for execution of the office.”³¹ Stair was comparing the Scots law of the latter part of the seventeenth century with that of Rome, but his words could be applied almost without modification to medieval Scots law.

Nor did the Scottish ecclesiastical lawyers derive their inspiration from the particular rules of the Canon law. On the Continent the ecclesiastical courts did not succeed in appropriating so large a share of executry business and, as a result, the canons themselves say little about wills and executors. The few scattered texts relevant to these matters could not have served by themselves as a foundation

²⁹ III.8.1–28.

³⁰ III.8.28–9.

³¹ III.8.30.

for the complex system which was evolved.³² These, however, were supplemented by extensive glosses which incorporated much Roman law and presupposed a system of administration varying from place to place but with much similarity in essentials. On this basis the English ecclesiastical lawyers had built up a comprehensive system for the administration of deceased persons' estates.³³ The similarities between this system and that developed in Scotland are too marked to be accidental. Those Churchmen who freely borrowed the substance of their Provincial Constitutions from those of the Church in England would not have hesitated to borrow and adapt English procedures for the administration of estates.

It would be supererogatory in an essay addressed to Scottish lawyers to insist that the medieval scheme of executry administration is the basis, not only of the system which Stair described, but of that in use today. Yet this was by no means a foregone conclusion. A crisis came in 1560 when the jurisdiction of the spiritual courts was abolished. Reforming zeal might well have led to a clean break with the past, but the "natural equity" and practical convenience of the old system ensured its restoration, under secular auspices indeed, but substantially unchanged. A different, and more subtle, threat to the old system came from the ubiquitous Roman law. The Scottish lawyers of the seventeenth and eighteenth centuries were not the men to allow a sentimental preference for their own institutions to blind them to the merits of others. On the Continent, particularly in Germany, the reception of Roman law led to a conflict of opinion and practice as to whether the characteristics of the Roman heir were to be applied to the heir or to the executor. It was the former who was favoured, with the result that the position of the executor was considerably weakened. In Scotland, however, the

³² See *Decretals*, III.26 and 27; VI.iii.11.1 and 2; VI.v.5.2; Clem. III.6.1.

³³ A useful description of this system will be found in Professor E. F. Jacob's Introduction to the Register of Henry Chichele, Vol. II, *supra*.

executor was already recognised as a species of heir *in mobilibus* and established so securely within the framework of our law that the same question could not be asked. The question was rather which characteristics of the Roman heir should be applied to the Scottish executor. The danger was that, in the influx of Roman ideas, the distinctive characteristics of the Scottish system would be submerged. Yet this did not happen. Certain characteristics of the Roman heir were applied to the Scottish executor, and the only result was that the latter emerged stronger than ever before and better equipped to meet the needs of the world today.

A. E. ANTON.

ROMAN LAW IN THE *REGIAM MAJESTATEM*

THE present contribution to the study of the *Regiam Majestatem* is directed to those portions which are based upon Roman or romanesque authorities. These portions form only a small part of the whole but, as I hope to show, they are of peculiar importance in relating the compilation to the history of the English common law. I use these words advisedly, for unless we realise that the *Regiam Majestatem* is essentially a book of English law, albeit with a Scottish reference, we shall fail to understand its genesis and the compiler's methods and purpose. As is well known, besides his extensive borrowings from Glanville and his incorporation of some Scottish material, the compiler made use of Azo's *Summa* of the Code ; but it does not seem to have been recognised that he used also Tancred's *Ordo Judiciarius* and Raymond of Peñafort's *Summa de Casibus* and perhaps Raymond's *Summa de Matrimonio*. The compiler's dependence upon these latter works adds to the links which bind him to the circle of contemporary English jurists. Why this is so I must explain later, but the first essential is to establish the dependence of the *Regiam Majestatem* upon Tancred and Raymond, and this can best be done by the method of parallel texts. A further purpose is served by doing this : for if the compiler depended upon these well-known sources they may serve to establish the text of the *Regiam Majestatem* in places where the existing manuscripts are defective. For though the oldest manuscripts may be late and several removes from the original, where we can go behind them to the ultimate source, there is the possibility of controlling scribal errors. Even the unanimity of the manuscripts may not always prevail against the ultimate source, for there is a probability that this unanimity represents not the compiler's intention but an early copyist's error.

The compiler's obvious and extensive borrowings from Roman or romanesque sources are placed at the end of the first book and the beginning of the second book of the *Regiam Majestatem*. There are incidental borrowings or echoes elsewhere, of which we must say something later. But for the moment it will be desirable to concentrate upon the more evident borrowings from Azo, Tancred and Raymond. These are exhibited below in parallel columns, together with certain passages from the original authorities upon which Azo, Tancred and Raymond relied and of which the compiler made use. That he was led to these particular passages by his textbooks is probable, but his very capacity to read these textbooks argues a preliminary training in civil and canon law. We may well credit him with a sound knowledge of the Institutes: his opening words "*Regiam majestatem*" recall at once Glanville's "*Regiam potestatem*" and Justinian's "*Imperatoriam majestatem*." There are indications that he knew the Gregorian Decretals and he presumably knew the Decretum also. The Code, or rather the first nine books, he knew through Azo, though we must remark that for his compilation he drew only on Azo's commentary on the third and fifty-fifth titles of the second book. Still, he must have known his way about Azo's *Summa* and he was civilian enough to work back from Azo's references to the Digest. One cannot judge a man fairly by an unfinished treatise that may be to a large extent raw material and sometimes merely notes, but his treatment does not suggest a man of more than modest accomplishments and learning. While therefore I do not doubt that parallels may not infrequently be found in earlier writers,¹ I feel confident that we can dismiss any idea that the compiler went beyond the sources I indicate, which are indeed just the current textbooks of his day. There are few sentences in the romanesque portions of the *Regiam Majestatem* for which I have not found a parallel in such a context as to

¹ For example, in the *Panormia* of Ivo of Chartres, which has been cited by Lord Cooper, *Regiam Majestatem* (Stair Society), pp. 29, 32.

imply borrowing. Possibly I have missed something : but in any case we must credit the compiler with a certain originality. I may remark that Azo's commentary is often a cento of citations from the Digest, and the compiler's use of Azo may give the impression that he is relying directly upon the Digest. But while he may have sometimes checked the references Azo supplies, for the most part he was content to borrow from Azo. Except therefore in those few cases where there are words in the *Regiam Majestatem* that Azo did not reproduce from the Digest, it would be misleading to print the text of Justinian as though it were the direct authority.

For the text of the romanesque portions of the *Regiam Majestatem* I have been content to accept that provided by Thomas Thomson in the *Acts of the Parliaments of Scotland*, though I have collated it with several manuscripts² and made some corrections. But as a matter of practical convenience I have adopted Skene's scheme of chapter and verse divisions and the numberings he gave to them. The verse numbers I have inserted also at the appropriate places in the sources as a ready means of comparing the compiler's work with his exemplars. This however is all the use I have made of Skene's text, for which, even allowing for the different standards of his age, I have but scant respect. In matters of spelling one must be arbitrary unless the reader is to be constantly disturbed by meaningless discrepancies. Since I have relied upon medieval manuscripts for the text of the *Regiam Majestatem* and have used Azo chiefly in a print of 1499,³ a Raymond of 1715 and another of 1744,⁴ an edition of Tancred of 1842,⁵ Friedberg's *Corpus Juris Canonici* and the Krueger-Mommsen edition of Justinian, as well as earlier editions, I have had varying canons of orthography before

² Thomas Thomson's IV, V, VI: these are the Bute manuscript and Adv. MSS. 25.5.10 and 25.4.13. I have also referred to a later manuscript, recently acquired by the National Library (MS. Acc. 2006).

³ At Venice.

⁴ The edition of 1715, published at Avignon, seems to represent the manuscripts better than the elaborate edition of 1744 published at Verona.

⁵ Pillii, Tancredi, Gratiae libri de *Judiciorum Ordine*, ed. F. Bergmann: Göttingen.

me. It has seemed best to reduce them to a medieval norm, excluding diphthongs, but without a pedantic employment of u where v is more usually acceptable. Comparison is, I trust, made easier by this barbarism.

I do not think that with these parallel texts before him the reader can fail to be convinced that the compiler of the *Regiam Majestatem* was a student of the current Roman lawbooks of the thirteenth century, just as he was a student of the leading and popular English lawbook, *Glanville*. This being so, it is evident that the compiler was using much the same material and following the same methods as Bracton. If we were speaking of two works of art so closely alike we should say that the authors belonged to the same school and we may, with a little extension of the meaning of the words, say that the authors of Bracton's treatise and of the *Regiam Majestatem* belonged to the same school. This is important for, if Bracton cannot claim a solitary pre-eminence, our notions regarding the development of English law in the thirteenth century may need to be revised. In one respect Bracton is singular, in the use he makes of plea rolls, but he uses them to provide illustrations and to establish distinctions. In this field, for all his elaboration, he makes few departures from the law he found in *Glanville*. Where he has an opportunity to expound a new development, the evolution of the action of trespass, he fails miserably and gives us a mere transcript of a title of the Institutes.⁶ Here Bracton is at his weakest: he is betrayed by his reverence for authority. His intention is not proleptic: he is not looking to the future. He concerns himself but little with the trends in the law he is administering or the new shapes the law will take. His thoughts are in the past: "animum erexi," he says, "ad vetera judicia justorum."⁷ There is here too clearly an echo of Azo's "erexit postea animum suum ad immensa volumina veteris prudentiae"⁸ to permit us to

⁶ With fol. 155-155b, that is Book III, chap. 36 of the older edition. (Woodbine, ii.437-439), compare Inst. 4.4.

⁷ Fol. 1.

⁸ In the introduction to the *Summa* of the Institutes: Azo is speaking of Justinian.

restrict our interpretation of Bracton's words either, as Maitland did, to the plea rolls on which he drew⁹ or, as Herman Kantorowicz did, to "the Romans."¹⁰ The clue to the meaning of Bracton's words is to be discovered only by identifying the sources upon which he relied, for it was the most noteworthy *facta, consilia et responsa* that he found there, which, as he tells us, he put together in the form of a *summa*.¹¹ English lawbooks, Roman lawbooks, plea rolls and more miscellaneous material are alike laid under contribution. Bracton elaborates the law he finds in *Glanville* with the judgments of the judges he reveres as his masters and with such few other authorities on English law as he has at his command: the Laws of Edward the Confessor, a register of writs, Magna Carta, the Provisions of Merton, the chapters of the eyre. But to supply deficiencies in *Glanville* he does not hesitate to go to the Roman lawbooks current in his day. Even within the last few years it was believed that Bracton made direct and extensive use of the whole *corpus* of Justinian¹² but recent investigations have indicated that, while he made extensive use of the Institutes, for the rest he relied mainly upon textbooks. The principal of these were Azo's *Summae* of the Code and the Institutes, Tancred's *Ordo Judiciarius* and Raymond of Peñafort's *Summa de Casibus* and *Summa de Matrimonio*.¹³ There were other books of which he made less use, some probably that have not yet been identified, but the most important were those just named. From these he could find his way to the relevant passages in the Code and Digest as well as to Gratian's Decretum and the Gregorian Decretals which he also used, though of these latter he may have had, as befitted a churchman, a working knowledge. To say these

⁹ Bracton's Note Book, i.40; *History of English Law*, i.185, n. 2.

¹⁰ Bractonian Problems, pp. 24-26.

¹¹ Fol. 1. Bracton would find a definition of *responsa* in Inst. 1.2: "sententiae et opiniones eorum quibus permissum erat jura condere." Bracton would have no idea of the classical background and of the function of jurists in the formation of Roman law, and could therefore give these words a wide and loose interpretation.

¹² This was the assumption made by Kantorowicz in his *Bractonian Problems*, pp. 58-78.

¹³ I have summarised what is known of Bracton's sources in *Traditio*, vi.61-104.

things is to say nothing derogatory : indeed Bracton would have been extremely foolish if he had not made use of such guides as came to his hand. It may be questioned whether he always used his Roman sources wisely, but the significant fact is that in his eyes they were of an authority equal to the authority of his English sources.

Now it is evident that the compiler of the *Regiam Majestatem* has exactly the same point of view. The substance of his law is *Glanville* and his compilation is largely a transcript of *Glanville*, but this he supplements with borrowings from Azo, from Tancred, and from Raymond of Peñafort. Since his book is for use in Scotland he also supplements *Glanville* with some specifically Scottish material and his fourth book is largely composed of this : but though there were rolls of the Scottish king's court in existence,¹⁴ he makes no use of them and perhaps had no access to them. Of the relationship of the *Regiam Majestatem* to the text of *Glanville* I have but little to say, which need not detain us here, and I cannot presume to add to the discussion of the compiler's use of Scottish sources. It is his use of romanesque sources that is particularly illuminating. First let us remark that they help to establish the date of the compilation of the *Regiam Majestatem*. Tancred's *Ordo Judiciarum* seems to have been completed not earlier than 1216, but it was in circulation a good many years before his death, which occurred about the year 1235¹⁵ : since the treatise long continued to be a standard textbook, it cannot tell us anything very definite of the date when it was in the hands of the compiler. Moreover, since Azo preceded Tancred, he too gives us little help, especially since his *divinum paene opus* continued to be a well used authority long after the introduction of printed books. All we can say is that Azo and Tancred point to the thirteenth century. But Raymond's two *Summae* tell us something very much more relevant. The *Summa de Casibus* was not published before 1227 and

¹⁴ Cooper, *Select Scottish Cases of the Thirteenth Century*, p. 21.

¹⁵ J. F. von Schulte, *Geschichte der Quellen des Canonischen Rechts*, i.201-204.

perhaps as late as 1234,¹⁶ while the *Summa de Matrimonio* (if this may be taken into consideration) was published still later, not before 1235 and possibly about 1240.¹⁷ Now a man who used either of these two books of Raymond's is not likely to have gone for his decretals to any other source than the authoritative collection issued by Gregory IX in 1234, a collection compiled by Raymond though bearing Gregory's name. And there is this further fact that there are two citations in the *Regiam Majestatem* that are Gregory's own pronouncements and cannot be supposed to have come from any other source than the Gregorian Decretals.¹⁸ The use of Raymond's *Summae* and the Gregorian Decretals would be quite possible for a Scottish lawyer working in the 1240's, but hardly at a date earlier than 1240. That he was working much later than this seems quite improbable, for otherwise there would appear to be no explanation of his neglect, or almost total neglect, of the legislation ascribed to Alexander II who died in 1249. Not all, perhaps relatively little, of the laws ascribed to Alexander had their origin in his reign, but of some laws there does not seem to be any serious doubt and these have left no trace in the *Regiam Majestatem*.¹⁹ For a date before the end of the thirteenth century there is some confirmatory evidence, though of a negative character, which it may be worth while mentioning. In the reign of Edward I of England, Bracton's treatise had passed into circulation and was being epitomised and adapted in such works as *Fleta*, *Britton* and Thornton's *Summa*. We should expect a Scottish lawyer with the point of view of the compiler of the *Regiam Majestatem* to rely upon Bracton if he were working at the end of the thirteenth century, but of Bracton's influence there is no hint at all.²⁰ This is worth saying, because it helps to dispose of any suggestion that

¹⁶ S. Kuttner, *Repertorium der Kanonistik* (Studi e Testi no. 71), p. 415.

¹⁷ Schulte, *op. cit.*, ii.412.

¹⁸ X.1.35.8 in lib. i.30 and X.4.20.8 in lib. ii.15.

¹⁹ Cooper, *Regiam Majestatem*, pp. 23-26.

²⁰ There are, of course, parallels, since there were common sources.

the *Regiam Majestatem* can be in any way due to the Edwardian conquest. The argument does not of course materially help the case for putting the date of the compilation in the 1240's: that case stands upon the positive argument that no Scottish lawyer is likely to have had access before 1240 to all the books the compiler used and upon the negative argument that no Scottish lawyer using Scottish legislation as part of his material is likely to have neglected the legislation of Alexander II had he known of it. Similar arguments have to be used for fixing the date of Bracton's treatise to 1255-56. And as in Bracton's case, when we have fixed a date for the compilation on such evidence it is no part of the argument that the author did not begin his task before the latest of his sources came to his hand.²¹ He may have begun some years earlier. All that is claimed is that the treatise in the form in which it has come down to us must have assumed its known state within certain narrow limiting dates.

If the *Regiam Majestatem* was compiled ten years or so before Bracton's treatise was put together by someone who used much the same textbooks, English and Roman, we have a fact of great importance for the history of English and Scottish law. Bracton had a precursor, a man of similar training and of a similar standpoint, who was working in Scotland. Bracton does not stand in isolation; he is, as I have already suggested, one of a school, though the most eminent of that school. The school was not a school of romanisers, though its members were trained in Roman law and might use Roman law to supply the deficiencies of contemporary English law. The author of *Glanville* is just as strongly imbued with Roman learning as either of the later writers who expanded his treatise. But since *Glanville* is little more than the exposition of the writ system as it had developed at the end of the reign of Henry II, there was no need for the author to borrow directly from civil or canon law. But his choice of language indicates that his mind has

²¹ *Traditio*, vi.82-100.

been formed by a training in Roman law, and this is still more distinctly indicated by the form of the treatise which is quite unlike any earlier English law book and belongs obviously to the class of practical manuals on procedure that contemporary Roman lawyers were producing. And although in the half-century or so between the publication of *Glanville* and the compilation of the *Regiam Majestatem* we can point to little legal literature written in England that has this double parentage, English and Roman, we must recognise that the most eminent English judges in this period were men with some tincture at least of Roman law. William Longchamp, justiciar from 1189 to 1191, was himself the author of a tract on Roman-canonical procedure. Hubert Walter, justiciar from 1194 to 1198, was a former student of Bologna and has been suggested as the possible author of *Glanville*. Two judges for whom Bracton evidently had special reverence were churchmen, Martin of Pattishall, Archdeacon of Norfolk in 1226, Dean of Saint Paul's from 1228 to 1229, and William of Raleigh, Bishop of Norwich from 1239 and Bishop of Winchester from 1244 to 1250. Doubtless, the impress of civil and canon law upon English law must not be exaggerated. Doubtless, also, one of the most remarkable characteristics of the English judiciary is that from the beginning of the reign of Henry II many of the judges were laymen, that the great office of justiciar was held as often by a layman as by an ecclesiastic, and that the trend so favoured the layman that by the reign of Edward I churchmen had been excluded from the courts of common law. But in the great formative period of English law, which reaches its culmination in Bracton's treatise, there seems to have been a never-ceasing succession of men eminent in the common law and at home in Roman law, as it was studied and understood at the time. It is in this setting that we must place the *Regiam Majestatem*, which is in itself an important piece of evidence for the conditions out of which it arose.

And now it may be helpful if I draw attention to the

way in which the compiler uses his Roman learning. His borrowings, as I have said, are chiefly at the end of the first book and the beginning of the second book, but there are occasional phrases and passages elsewhere that recall the language of the compiler's romanesque authorities. It is perhaps a point to remark that throughout he seems to avoid the technicalities of his authorities and to choose words that will be understandable by readers who have had no training in Roman law. But we must not on that account underrate the compiler's own equipment. He is no mere copyist of learning he barely understands himself. This will be plain when we go behind the opening chapters of his second book to his sources. He has before him Azo's *Summa* of the Code and Tancred's *Ordo Judiciarius*: he goes from one to the other, picking a phrase here and a phrase there, turning up their references and occasionally using a phrase or so from the original authorities, in particular from the Digest and the Decretum. Having found his way to the eighth title of the fourth book of the Digest, *De receptis*, he seems to have read it through and taken more than was indicated by Azo's references. Similarly Tancred's reference to a verse in the Decretum caused him to read forward. The copies of Digest and Decretum before him were of course glossed, and so it is that we find him adapting to his purpose brief portions of the ordinary glosses to these two authorities. I do not think I am underrating his learning or misconceiving his methods. Indications of wider reading are few. His work is not of a high order nor is it intended to be. For all the compiler has in mind is to supplement *Glanville* where he finds this, his main authority, deficient and to simplify the learning of his romanesque masters to suit the primitive conditions to which his own book is meant to apply. So we get brief chapters on pacts and promises (Book I, Chapters 28–31), arbiters and arbitration (Book II, Chapters 1–10), and the ordination and manumission of serfs (Book II, Chapters 13–14). The first group of chapters is from Azo, the second group from

Azo and Tancred, the third group from Raymond. There is romanesque learning also in Chapters 15 and 17 of the second book, which deal with dower: this is intermixed with English law and, though there seems to be indebtedness to Raymond, the borrowing is more general than elsewhere and phrases are not taken over as they stand. It is in the fifteenth chapter that there occurs a citation from the Gregorian Decretals to which the compiler may have been led by Raymond's *Summa de Matrimonio*, and it is possible that in the same way another citation from the Decretals has been embodied in Chapter 17. Elsewhere there are words and phrases that it would be idle to seek to trace in any specific romanesque source. Thus in Chapter 12 of the second book the compiler notes that serfs who are bound to the soil "ascripticii lege imperatoria nuncupantur."²² But we have to do with a man whose familiarity with the language of the civil law is manifest and who probably learned to be a canon lawyer before he became a common lawyer. He cannot avoid Roman terms.

It is with diffidence that one who has examined in detail a small part of the text of the *Regiam Majestatem* can express even a tentative view on the text as a whole. But it may be that there are some features of the text that have attracted my attention which have hitherto escaped notice and which it may be worth recording for the benefit of some future scholar who will undertake the preparation of a critical edition of the treatise. That such an edition is needed is perhaps not so widely recognised as it should be—needed not only for the history of Scots law but for the history of English law as well. For *Glanville* and the *Regiam Majestatem* are a common inheritance from a time when the two kingdoms had the same system of law, when although there were differences in detail these were no greater than the differences between the law of Kent and the law of Westmorland.

²² He would find such words in many places. But perhaps he had in mind Azo's words in his commentary on Inst.1.3: "inter ascripticios et servos nulla sit differentia."

I have already said that I have been content to accept Thomas Thomson's text, subject to a few corrections. This is not because I think that his text might not be bettered but because any attempt at constructing a better text would have taken me far from my limited purpose. A better text cannot be constructed with confidence merely for the portions that are my immediate concern. The criteria one applied to those portions might be invalidated upon an examination of other portions of the text. At the threshold one is halted by the consideration that the existing manuscripts appear to represent more than one early tradition and that it would be necessary to decide to which tradition a variant reading belonged, unless indeed it were some accidental error or late addition. There were, it would seem, at least two traditions which perhaps did not greatly differ but which still had significant variants. For example, where Thomson gives the reading (I.30.1) "Item pactorum due sunt species," there is good manuscript authority for an alternative reading "Divisiones pactorum due sunt."²³ Again where Thomson gives the reading (II.1.9.) "Item qualiter finiri debeat arbitrium," there is an alternative reading "Item qualiter debeat fieri arbitrium," which also rests upon good manuscript authority.²⁴ In this case Thomson's reading is supported both by the parallel text of Tancred and by a later connected section of the same chapter (II.10) of the *Regiam Majestatem*. Presumably, then, at this point Thomson's reading represents the author's original text; but do both of the readings Thomson adopted belong to the same tradition? A much wider investigation is necessary to answer that question, and, in answering it, one of the main problems confronting the future editor of the *Regiam Majestatem* would be solved.

It is indeed likely that what appears to emerge from an examination of the romanesque portions of the *Regiam*

²³ Bute MS. and Adv.MS. 25.5.10. Adv.MS. 25.4.13 and MS.Acc.2006 give the reading Thomson adopted.

²⁴ Bute MS. and Adv.MS. 25.4.13. This reading is found also in MS.Acc.2006. Adv.MS. 25.5.10 omits this sentence.

Majestatem will be confirmed by an examination of the whole of the treatise; but at present it cannot be more than a hint of what a full investigation would be likely to establish. And to disentangle the two traditions—if their existence may be assumed—might not be an easy task. By the time the earliest of the existing manuscripts came to be written there had been ample opportunity for two traditions to be confused.²⁵ This is a common phenomenon, which is well illustrated by the manuscripts of Bracton, although in that case the problem is of peculiar difficulty because Bracton's treatise appears to have been left not only as a draft, imperfectly revised, but as a peculiarly confused draft which in places sorely perplexed the earliest copyists who set up different traditions that crossed and re-crossed as manuscripts were multiplied. Fortunately the first three books of the *Regiam Majestatem* depend so largely and so closely upon well-ascertained sources, that the task of reconstructing the primitive text is much more hopeful: it is the fourth book, consisting largely of Scottish material, that is likely to present the more formidable problem.

Although it is no part of my task to discuss at length the relationship of the *Regiam Majestatem* to *Glanville*, I may stray so far from my path as to record one fact that has apparently not yet been noticed. Professor Woodbine has shown that the manuscripts of *Glanville* follow two main traditions, *alpha* and *beta*, and he came to the conclusion that *beta* represented the primitive text, while *alpha* represented "a more finished and somewhat expanded version, made . . . by an ecclesiastic."²⁶ Mr. R. W. Southern, however, has shown good grounds for the contrary opinion that *alpha* represents the original text and that *beta* represents a later revised version, more adapted to English conditions and divided for easier reference into books and chapters, whereas the original version was divided into unnumbered "tracts" (*tractatus*).²⁷ When we compare

²⁵ This will be plain even from the references in the two preceding notes.

²⁶ Woodbine, *Glanville*, pp. 17-18.

²⁷ *English Historical Review*, lxxv.81-85

the text of the *Regiam Majestatem* with the *alpha* and *beta* texts of *Glanville* it becomes clear that the manuscript the compiler of the *Regiam Majestatem* had before him belonged to the *alpha* tradition. A single example will suffice to make this plain. I reproduce paragraphs 9 and 10 from the sixteenth chapter of the second book of the *Regiam Majestatem*.

9. Si vero de questu nichil fuerit expressum in dotis assignacione, licet parum habeat tenementi et postea *multum* adquisierit, non poterit mulier clamare plus tercia parte illius tenementi quod habuit *is qui mulierem dotavit tempore desponsacionis*.

10. Idem dico *si quis* eciam de *denariis* et *aliis catallis terram non habens* sponsam suam dotaverit et postea magnum questum fecerit in terris et tenementis ipsa decetero de illo questu in dotem *de jure* clamare non poterit.

In place of the words in italics, which represent readings of the *alpha* tradition, the *beta* texts read “*multa*,” “*quis tempore desponsacionis quo mulierem dotavit*,” “*si quis in catallis et in rebus terram non habens vel eciam in denariis*” and omit “*de jure*.”²⁸ It is evident then that in any attempt to construct a critical text of the *Regiam Majestatem* there must be collated one or more manuscripts of the *alpha* tradition of *Glanville*. And we can be more precise still. A feature of some manuscripts of the *alpha* tradition is that here and there they mention by name justices of the reign of Henry II who held differing views on points of law.²⁹ The names in one such passage have been carried over to the *Regiam Majestatem* (II.33.2, 5)³⁰:

Dicunt quidam, scilicet Ranulfus de Glanvilla, filium postnatum rectiorem esse heredem quam nepotem talem scilicet filium primogeniti . . . Aliis vero visum est

²⁸ *Glanville*, lib.vi, c. 2 (Woodbine, p. 88).

²⁹ *English Historical Review*, lxx.87-89.

³⁰ Corresponding to lib.vii, c. 3, of *Glanville*. Woodbine (p. 103) has noted few of the *alpha* readings in this chapter and none that is apposite in the present connection.

contrarium, ut Ricardo de Lucy, talem nepotem de jure avunculo suo esse preferendum.

We can then be sure that the manuscript the compiler of the *Regiam Majestatem* had before him contained these two names, probably in the form of marginal glosses, for it is in the margin that these names seem to have been originally placed in some *alpha* text of *Glanville*.³¹ The number of manuscripts of *Glanville* from which a choice had to be made by any future editor of the *Regiam Majestatem* could therefore be narrowed. It is hardly to be expected that the actual manuscript used by the compiler could be recovered, but it is reasonable to suppose that one or two very nearly related manuscripts could be found. Unfortunately, perhaps, editors of *Glanville* have preferred the *beta* tradition and the text of the *Regiam Majestatem* may consequently have seemed to diverge more widely from the text of *Glanville* than it does in fact.

While the identification of the text of *Glanville* upon which the author of the *Regiam Majestatem* relied may be of material help in establishing his text, it will not help in establishing the date of writing. The *beta* text of *Glanville* appears to have been evolved by about the year 1200,³² and both *alpha* and *beta* were copied and circulated, apparently indifferently, in the thirteenth century. It was presumably merely by accident that a manuscript of a particular type came to be adopted as the main basis of the *Regiam Majestatem*. The evidence that this particular manuscript was glossed again does not help us greatly to determine the date of the manuscript, for the glosses appear to have been added at an early date, perhaps in the twelfth century. All we can say is that the use of a manuscript of this particular type is not inconsistent with the evidence which indicates that the *Regiam Majestatem* was written in the 1240's.

H. G. RICHARDSON.

³¹ *English Historical Review*, lxxv.88n. The manuscripts here cited, while supplying the names of the two justiciars, state, however, that they agreed in the second opinion.

³² Woodbine, p. 17.

Note:—Passages from original authorities underlying Azo, Tancred and Raymond are printed in smaller type.

Azo, SUMMA CODICIS, II.3

- (1) Pactum est consensus duorum pluriorumve in idem,
et bene dixit in idem
- (2) et non in eodem.
Si enim ego et tu consenciamus, puta quod Socrates
sit lapis, non est pactum, quia neutrum alteri talis
consensus obligat . . .
- (3) Et per hoc quod pactum dicitur consensus duorum
differt a pollicitatione, quia pollicitatio est solius
offerentis promissio . . .
- (4) Dicitur autem pactum a pace et actu, quasi pacis
actum, nam qui paciscuntur ex diversis et con-
trariis animorum motibus post multa variaque
certamina in unam consonantem deducunt
sententiam . . .
- (5) Vel dicitur a percussione palmarum.
Veteres enim consencientes palmas ad invicem sibi
percuciebant in signum non violande fidei.

REGIAM MAJESTATEM, I.28

De pacto et pollicitatione

1. Pactum est duorum vel plurium consensus in eandem
rem, scilicet dandam vel accipiendam.
2. Non autem in eodem vero vel falso. Nam si duo
vel plures consenciant in hoc vero Willelmum esse
hominem vel in hoc falso Willelmum esse bovem
non erit pactum, quia non erit obligatorium. Talis
enim consensus neutrum alteri obligat.
3. Et per hoc quod dixi "duorum vel plurium," pactum
differt a pollicitatione, quia pollicitatio promissio est
unius solius hominis offerentis alteri.
4. Dicitur autem pactum a pace et actu, quasi pacis
actus, nam paciscitur vel paciscuntur cum ex diversis
et contrariis motibus animorum post multa et varia
certamina in unam consonantem voluntatem et sen-
tentiam convenire dicuntur.
5. Vel dicitur pactum a percussione palmarum.
Veteres enim cum se obligabant palmas manuum
suarum ad invicem percuciebant in signum non
violande fidei, unde pactum dicitur quasi palme
ictus.

R.M. I.29

De pacto in rem et pacto in personam

1. Pactorum due sunt species. Nam quedam sunt in rem quedam in personam.
2. In rem sunt quociens generaliter aliquis pactum facit ne petat aliquid.
3. In personam autem quociens ne a persona certa petat aliquid.
4. In illo casu neque ab illo cui sit pactum peti potest res nec ab heredibus suis.
5. Utrum autem in rem aut in personam factum fuit pactum non minus ex verbis quam ex mente contrahentium estimandum est.
6. Plerumque enim in pacto persona inseritur non ut personale sit pactum set ut demonstretur cum quo pactum factum sit.

(1) Item alia sunt in rem alia in personam vel ex utraque parte vel ex altera tantum.

(5) Et hoc non tantum ex verbis sed ex mente contrahentium perpendi potest. *Azo here gives a reference to Dig. 2.14.7.8., which supplies the bulk of the material for R.M. I.29 :—*

- (1) Pactorum quedam in rem sunt, quedam in personam.
- (2) In rem sunt quociens generaliter paciscor ne petam.
- (3) In personam quociens ne a persona petam, id est ne a Lucio Ticio petam.
- (5) Utrum autem in rem an in personam pactum factum est non minus ex verbis quam ex mente conveniendum estimandum est.

(6) Plerumque enim . . . persona pacto inseritur non ut personale pactum fiat, sed ut demonstretur cum quo pactum factum est. *Azo gives a further reference to Dig. 2.14.5.7, which seems to have suggested clause 4 :—*

Qui in futurum usuras a debitore acceperat tacite pactus videtur ne intra id tempus sortem petat. Si ex altera parte in rem ex altera parte in personam pactum conceptum fuerit, veluti ne ego petam vel ne a te petatur, heres meus ab omnibus vobis petitionem habebit et ab herede tuo omnes petere poterimus.

- (1) Pactorum igitur quedam sunt inutilia quedam utilia.
- (2) Et primo de inutilibus videamus.
- (3) Et quidem pactum inutile est ratione paciscentis, ut si fuerit furiosus, nam expressum consentire non potest . . . sed nec tacite.
- (5) Si autem fuerit pupillus qui paciscitur, si sit capax intellectus ut saltem naturaliter se obliget, et valet pactum, alioquin non . . .
Hoc ubi vult se obligare, nam si alium vult sibi obligare potest etiam sine tutore . . .
- (6) Item inutilia sunt ratione contractuum, ut inter virum et uxorem, qui donare sibi non possunt set vendere . . . Item ratione potestatis . . .
- (7) Item ratione rerum que promittuntur pacta censentur inutilia, ut si impossibile promittatur . . .
- (10) Idem est si de jure sit impossibile,
- (9) puta contra leges . . .
But Azo's bare statement has been supplemented from the Institutes and the Decretals

Inst. 3.19.1:

- (7) At si quis rem que in rerum natura non est aut esse non potest dare stipulatus fuerit . . .

De pactis utilibus et inutilibus

1. Item pactorum due sunt species: quedam sunt utilia et quedam inutilia.
2. Utilia sunt omnia ea que non sunt inutilia.
3. Sunt igitur pacta inutilia ratione personarum, ut pactum factum cum furioso qui pacto de jure consentire non potest. Quod intelligitur de continuo furioso.
4. Secus est si habeat dilucida furoris intervalla, sicut de lunatico.
5. Item inutile dicitur pactum in pupillo et minore qui nondum doli capax est et hoc ubi pupillus vult obligari. Sed aliter est si alium sibi vult obligare, quod facere certe potest sine auctoritate tutoris.
6. Sunt etiam pacta inutilia ut in viro et uxore, ubi uxor nichil potest ducere in pactum sine auctoritate viri sui.
7. Item deficit pactum si res que in pactum deducitur non existat in rerum natura.
9. Item cessat pactum in prohibitis licet juramentum sit appositum.
8. Item cessat pactum in his que vertuntur in anime detrimentum.
10. Et pactum turpe vel rei turpis et impossibilis de jure et de facto nullam obligationem inducit.

X. 1.35.8 :

- (8) Quod etiam de aliis est dicendum que observate vergunt in anime detrimentum.
 (10) Nam . . . pactum turpe, vel rei turpis aut impossibilis de jure vel de facto, nullam obligationem inducit.

- (1) Superest ut videamus ad quos vires pactorum porrigantur vel quibus noceant . . . Quod autem dictum est de paciscente intelligendum est de succedentibus ei sive in rem sive in jus universum succedant, ut eis proficit pactum si fuerit in rem.
Azo did not supply directly the material for the rest of R.M. I.31; but clause 2 is the correlative of clause 8 of R.M. I.30, while clause 3 may have been suggested by Dig. 2.14.5.7, which seems already to have suggested clause 4 of R.M. I.29.

R.M. I.31

Ad quas personas pacta se extendunt

1. Porriguntur autem vires pactorum ad alias personas ut pactum predecessoris obligat successorem et pactum patris filium obligat.
2. Et omne pactum quod non veritur in anime detrimentum servandum censemus.
3. Pactum autem de usuris non servetur.

Azo, *SUMMA CODICIS*, II.55

- (1) Explicitis preparatoris iudiciorum videndum esset de iudiciis,
- (2) sed quia arbitraria tractantur velud iudicia . . . videamus ergo quid sit arbitrium
- (4) et quis possit esse arbiter
- (6) et de qua re et qui possint sub arbitrio litigare et qualiter constituantur et
- (7) qualiter ad effectum perducatur.

TANCRÉD, *ORDO JUDICIARIUS*, I.3

- (2) Quia ad instar iudiciorum arbitraria sunt redacta . . . ideo postquam tractavimus de aliis iudiciis consequenter de arbitrio videamus.
- (3) Ostendamus itaque qui iudices sunt arbitrarii
- (4) qui possunt arbitri esse
- (6) de quibus causis potest in arbitros compromitti
- (8) in quibus differunt arbitraria a iudiciis
- (9) et qualiter finitur arbitrium

R.M. II.1

1. Preparatoriis iudiciorum expeditis ad iudicia pro parte procedere statuimus.
2. Sed quoniam ad instar iudiciorum arbitraria sunt redacta, videamus quid sit arbitrium.
3. Et in quot personas debeat compromitti.
4. Et qui possunt esse arbitri.¹
6. Item de quibus rebus valeat compromitti in arbitros.
7. Item quis sit effectus arbitriorum.
8. Et in quibus differunt iudicium et arbitrium.
9. Item qualiter finiri debeat arbitrium.

R.M. II.2

1. Arbitrium est actus personarum super civili questione et querela quasi in iudicio contendencium.
2. Nam et iudex laborare debet ad investigandum veritatem.

- (1) Dic ergo arbitrium est trinus personarum actus super pecuniaria questione in quasi iudicio confligentium vel contendencium,

¹ Skene inserts a fifth clause "et qui prohibentur esse arbitri"; but this seems to have formed no part of the original text.

- (2) et arbiter contendit ad inquisitionem veritatis,
 (3) actor ut ei condemnnetur reus.
 (4) Item reus ut absolvetur ab actore
 . . .

- (2) Arbiter autem potest esse homo liber paterfamilias, item filius familias etiam de re patris.
 (3) Item potest esse arbiter ingenuus et libertinus integre fame.
 (1) Potest autem esse arbiter in omni re nisi prohibetur a lege.

- (1) Servus autem non potest esse arbiter sive ipse solus sive cum libero recipiat arbitrium . . .
 plane si compromittatur in servum et liber sententiam dixerit . . .
 (3) Item non potest esse arbiter furiosus aut surdus aut mutus.
 (4) Vel minor viginti annis . . .

² In *Acts of the Parliaments of Scotland* there is inserted at this point clause 1 in the following chapter.

I. 3 § 2

- (1) Possunt esse arbitri omnes qui non prohibentur.

R.M. II.3

Qui prohibentur esse arbitri

1. Posset autem esse arbiter qui non prohibetur a jure.
 2. Ut puta liber homo, pater familias et heres patris familias.²
 3. Item oportet quod arbiter sit bone fame.

R.M. II.4

1. Sed non servi licet partes consentiant in eis.
 2. Item femine non possunt judicare in arbitrio.
 3. Item prohibetur compromitti in furiosum, surdum et mutum.
 4. Item minor viginti unius anni arbiter esse non potest.

- Prohibentur (2) mulier
 (4) minor viginti annis . . .
 (1) prohibetur servus
 (3) surdus et mutus . . .

3. Actor, id est petens, ad causam suam amplificandam.
 4. Tenens vero ad extenuandam causam et querelam adversarii sui per exceptionem.

Azo, SUMMA CODICIS, II.55—*cont.*

(2) Item femina non potest esse arbiter.

(5) Item non potest esse arbiter ille qui ejus rei judex est ordinarius: recipit compromissum vel partibus sponte sub eo litigantibus vel ipso eas compellente ut in se compromittant

Azo has here a reference to Dig. 4.8.9.2:

Si quis judex sit, arbitrium recipere ejus rei, de qua judex est, inve se compromitti jubere prohibetur lege Julia.

(10) Nec est contrarium quod legitur in [Nov. 86.2] quia per amicabilem compositionem potest dissolvere que dubia sunt inter eos . . . set magis proprie arbitratus.

I. 3 § 2—*cont.*

(5) Et quidam³ dicunt quod judex ordinarius arbiter esse non potest super lite que coram eo tractatur. *Tancred, following Azo, refers to Dig. 4.8.9.2, and also to the Decretum C.3.q.7.3.17: the latter reference led to the gloss on judex in C. 3.q.7.3.19:*

(6) . . . Quare autem ordinarius non potest esse arbiter, triplex assignatur ratio.

(8) Una quia secundum hoc ordinarius semper procuraret ut eligeretur in arbitrium ne ab ipso posset appellari.

(7) Alia ratio est quia ordinarius debet cogere arbitrium ut procedat, debet suam sententiam mandare executioni . . . Sed hoc non posset esse, cum idem esset ordinarius et arbiter.

(9) Tercia ratio est quia . . .

At this point R.M. ceases to follow the gloss and substitutes the substance of Dig. 4.8.9.2, which has already been used for clause 5.

³ That is Azo.

R.M. II.4—*cont.*

5. Item ballivus qui potestatem ordinariam habet arbiter esse non potest, lege dicente. Si quis judex vel ballivus sit, arbitrium recipere ejusdem rei de qua ballivus existet vel in se compromitti jubere prohibetur.

6. Et est triplex ratio quare ballivus arbiter esse non potest.

7. Prima, quia si nollet pronunciare non est aliquis qui eum cogeret ad pronunciandum, cum per ballivum cogi debeat arbiter ad pronunciandum.

8. Secunda ratio est quia, si contigerit sententiam, iudicium seu pronunciacionem quam ipse ballivus ferret impugnari, timendum esset an ballivus eam defenderet animose.

9. Tercia ratio est quia iudex prohibetur in se arbitrium suscipere jubendo sibi ipsi in se arbitrium compromitti.
10. Sed ballivus ordinarius potest esse arbitrator, id est amicabile compositor, quia potest ballivus per amicabilem compositionem solvere que sunt dubia inter partes.

R.M. II.5

In quem numerum potest compromitti

1. Debet autem compromitti in imparem numerum, quo numero Deus gaudet, scilicet in unum aut in tres.
2. Quia si contigerit tres non concordare in iudicio pronunciando obtineat, id est valida sit sententia reliquorum duorum.
3. Sed queritur an valeat arbitrium si partes compromittant in duos arbitros?
4. Et videtur quod non, nam si dissenciant res sine effectu vel exitu itura est.

- (1) Item valet compromissum si fiat in unum. Item si fiat in tres.
- (2) Invenitur enim pars major cujus arbitrio pareri potest.
- (3) Sed et usitatum est in duos compromitti,
- (4) licet si dissenciant non invenitur pars major unde compromissum sine exitu videtur futurum per naturalem facilitatem hominum ad dissencendum.
- (5) Adhibet tamen lex tale remedium ut ubi dissenciant duo arbitri cogat eos pretor terciam eligere

Azo, SUMMA CODICIS, II.55—*cont.*
 personam certam cujus auctori-
 tati pareatur . . .
Azo's exposition is based on Dig.
4.8.17.6 to which he gives a
reference. Here are found the
words
in impari enim numero idcirco com-
promissum admittitur
which have supplied the begin-
ning of the first clause of this
chapter.

R.M. II.5—*cont.*

5. Sed certe solitum est compromitti in duos arbitros, et si dissenciant tunc ballivus, si arbitri electi fuerint in curia, potest cogere illos duos terciam et certam eligere personam sibi, ut per decretum suum consonans et certa feratur sentencie pronunciatio.

R.M. II.6

In quibus causis potest compromitti vel non compromitti

1. Potest utique compromitti in pecuniariis causis et temporalibus et super spiritualibus.
2. Sed in matrimoniali et liberali ac criminali causa de jure non compromittitur in arbitros sed in arbitratores et amicabile composi-
tores.
3. Item nec compromissio pareatur nisi metu pene apposite.

I. 3 § 1

- (3) Arbitri sunt qui de consensu par-
cium eliguntur. Et in eos sub
pene stipulatione compromittitur
ut metu pene ipsorum sentencie
stetur.

I. 3 § 3

Sequitur de quibus causis potest
iri ad arbitros.

- (1) Et dicendum est quod de omni-
bus,
- (2) exceptis criminalibus et liberali-
bus et matrimonialibus.

I. 3 § 4

- (4) Item non potest sentenciare arbiter altera parte absente, nisi hoc actum est in compromisso.

4. Item ex pacto agi potest inter partes ut pronuncietur in arbitrio uno litigatorum absente et altero presente.

R.M. II.7

- (1) Item sit compromissum ut arbiter certo loco cognoscat et pronunciet.

1. Item ut certo loco pronuncietur.
2. Alioquin ibi pronuntiabitur ubi compromissum est.

- (2) quod si de loco nichil appareat actum, is videtur inesse locus ubi compromissum

The compiler of R.M. has already turned from Azo's text to Dig. 4.8: evidently he reads the whole chapter and selects suitable passages :

Dig. 4.8.13.3 :

- (5) Arbitr ex compromisso his diebus non cogitur sententiam dicere quibus iudex non cogitur, nisi dies compromissi exitura sit nec proferri possit.

Dig. 4.8.36 :

4. Item arbitri feriatis diebus pronunciare non possunt.
5. Nisi in tribus casibus scilicet princepe vel suo ballivo cogente vel de consensu pareium vel si certus dies compromissi datus sit et ille dies sit exiturus.

AZO, SUMMA CODICIS, II.55—*cont.*

- (4) Si feriatis diebus, cogente pretore, arbiter dicat sententiam et petatur ex compromisso pena, exceptionem non habere constat . . .

Dig. 4.8.27.2:

- (1) Stari autem debet sentencie arbitri quam de ea se dixerit sive equa sive iniqua sit.

At this point the compiler turns to the gloss:

dummodo non sit contra leges et sacras constitutiones . . . et sit sollemniter lata . . . et dolo arbitri careat.

The compiler has now finished with his borrowings from the Digest and returns to Azo:

- (2) Decernit enim nova constitutio nullum sit arbitrium fieri ut cum sacramenti religione . . . sed penam statuat . . .

- (1) Quid autem si vallatum fuerit arbitrium sacramento et pena, certe nichilominus tenet commissum . .

R.M. II.8

De effectu sentencie arbitrorum

1. Effectus arbitrorum est ut sentencie arbitrorum stetur sive equa sit sive non equa dummodo non sit contra leges et sit sollemniter lata et quod arbitri dolo careat et si pena aliqua arbitrium sit vallatum
2. Et si non sit pena vallatum sed iuramenti vel fidei interposicione secundum iura canonica valet sed secundum leges regni non tenet.

- (2) Potest et illud agi quando committitur in plures ut vel unus dicat sententiam vel major pars vel etiam omnes : sed si de hoc nichil sit dictum omnes debent esse presentes et pronunciare . . .
- (1) In contumaciam autem non potest judicari multam quia hoc magistratibus tantum permittitur.

For the third clause in R.M. II. 9, which reflects local conditions, there is no parallel in the sources.

I. 3 § 4

- (1) Differt autem arbitrium a iudicio in multis . . . nam venalis sententia iudicis non valet . . . sed sententia arbitri per sordes et precium data tenet . . .

R.M. II.9

In quibus differunt iudicium et arbitrium

1. Differunt autem arbitrium et iudicium in his quod ubi ballivus possit punire contumacem arbiter non potest, quia hoc solum ballivis concessum est.
2. Item si duo vel tres arbitri electi sint per partes nullus sine sociis procedere potest.
3. Sed si quatuor sint ballivi unus potest procedere et tenere curiam suam sine sociis suis.

R.M. II.10

- (4) item in arbitrio non succedit heres nisi hoc expresse dicatur in compromisso.

I. 3 § 5

Finitur arbitri iurisdiccio si de omnibus de quibus in eo commissum est sentenciaverit . . .

1. Solvitur autem et finitur arbitrium morte parcium vel arbitrorum.
2. Die arbitrii transacta ante pronunciacionem iudicii.
3. Et pacto facto inter partes.
4. Item heres litigatoris non stabit arbitrio arbitrorum si pater suus premoriatur antequam arbitrium

AZO, SUMMA CODICIS, II.55—cont.

For the last three clauses of R.M. II.10 there are no direct parallels in Azo or Tancred. The influence of Dig. 4.8. is manifest and the compiler probably had in mind a passage in Dig. 4.8.32.

1 :

Non cogetur arbiter sententiam dicere
si pena commissa sit.

He may perhaps have drawn upon a gloss that did not find its way into the accepted text.

I. 3 § 5—cont.

(2) finitur etiam elapso die in com-
promisso appposito.

(3) Item si litigatores ad iudicium
vel aliud arbitrium ierint . . .

(1) item mortuo arbitro vell litiga-
torum aliquo.

R.M. II.10—cont.

iudicio finiat, nisi in arbitrio
mencio fiat de heredibus.

5. Sed queritur an pena soluta ab eo
qui non paret peti possit iudica-
tum. Respondeo non, duabus
rationibus.

6. Primo quia si sic ageret contraria
postularet. Pena enim petitur
quia non paretur arbitrio, iudica-
tum vero quia statum sentencie et
arbitrio. Et ideo tanquam petens
contraria non audietur.

7. Secundo quia ex sententia arbitri
super pena assumpta principale
non transit in rem iudicatam.

At this point the compiler ceases to draw upon Azo or Tancred. R.M. II.11 follows Glanville's text closely. R.M. II.12 introduces fresh matter, with a few romanesque touches, as in II.12.3, where there is a reference to Justinian, and again in II.12.14, where the words jugum servitutis evadit, are drawn from the Decretum, as they are in II.13.6. In II.13 the compiler begins to borrow from a fresh romanesque source, Raymond of Peñafort.

De servis non ordinandis et de manumissionibus eorum

Postquam vidimus de temporaliter obligatis perpetuo, videlicet de servis non ordinandis (2) videndum ergo qualiter servi possint ordinari, quid juris sit si fuerint ordinati non premissa manumissione . . . Nullus servus . . . debet ordinari nisi prius manumittantur . . . Racio hujus prohibitionis est duplex

(1) scilicet servilis utilitas et clericalis dignitas
Here a reference to the Decretum, dist. 54, c. 21, takes the compiler to the words:

tanquam servilis vilitas hunc honorem jure capiat.

(3) Si servus fuerit ordinatus non adepta libertate distingue, aut est ordinatus sciente domino aut ignorante . . .

(4) Si autem sciente et non contradicente eo ipso ingenuus sit . . .

(7) Si vero ignorante domino similiter subdistingue, quia aut ordinatore vel presentatore sciente ordinandi condicionem aut non. In primo casu remanebit in ordine

(8) set ordinator vel presentator debet condemnari domino in duplum . . .

De servis non ordinandis

- 1 Item servilis condicio clericalem non capiat honorem.
2. Videndum est igitur quid juris sit si sine manumissione servi sint ordinati? Circa hoc distinguendum est.
3. Nam aut servus ordinatur sciente domino aut ignorante.
4. Si sciente et non contradicente, liber sit et ingenuus, nec distinguendum est in quo ordine sit ordinatus.
5. Si vero ignorante domino, ignorantibus etiam ordinatore et presentatore, in illo casu revocatur ille ordinatus in servitutem et reddi debet domino suo si fuerit in minoribus ordinibus ordinatus.
6. (a) Presbyter autem factus serviet domino suo in divinis officiis cuius quam serviet aliis.
6. (b) Servus autem factus monachus jugum servitutis evadit.
7. Sed si sciente ordinatore vel presentatore servus fuerit ordinatus in presbyterum vel in quencunque alium ordinem manebit liber imperpetum
8. Sed ordinator vel presentator tenetur dare domino illius sic ordinati mancipia vel servicia mancipiorum, id est aliquorum aliorum servitium.

RAYMOND, SUMMA DE CASIBUS, III.17—cont.

- (6) (a) In secundo casu, scilicet ordinatore vel presentatore ignorante conditionem ejus, si est ordinatus in sacerdotem remanebit in ordine . . . peculio tamen si quod habeat domino restituito;
- (5) si in diaconum, dabit pro se vicarium unum (id est alium servum) domino et ipse remanebit in ordine, alias revocabitur in servitutem: si vero in subdiaconum vel infra indistincte revocabitur in servitutem . . . Tamen hodie ordo subdiaconalis cum diaconali gradu privilegio gaudet eodem.
- (9) Et nota quod dominus in casibus quibus habet jus revocandi servum ordinatum poterit infra annum tantum revocare et non ultra . . .
- (10) et computatur ille annus secundum Alanum, cui assensio, a tempore sciencie domini . . . H. vero dicit a tempore ordinationis . . .⁴
- (6) (b) De servis qui ingrediuntur monasterium respondeo supra *De Votis* [lib. I, c. 8]
Here there is a reference to the Decretum, Dist. 54, c. 21, which contains the sentence:

Verum et, si legitimo probatus experimento, monachus efficiatur, evadit jugum servitutis.

⁴ Raymond here refers to the opinions of two Bolognese glossators: Huguccio, who became bishop of Ferrara in 1190 and died in 1210, and Alan, an Englishman, of whom less is known, but who flourished early in the thirteenth century.

R.M. II.13—cont.

9. Et nota quod in his casibus in quibus dominus habet jus repetendi seu revocandi servum suum ordinatum, ipse potest revocare eum tantum usque ad unum annum, ut supradicitur de servo manente in burgo, et non ultra.
10. Et computabitur ille annus a tempore sciencie domini vel a tempore ordinationis clerici.
11. Sed quid si dominus servum calumpneat quem dicit invito ipso et ignorante ordinatum fuisse, ubi agitur hec causa status?
12. In hoc casu volumus hanc causum status in qua agitur de revocando clerico de statu clericali ad statum servilem in foro ecclesie illius in qua est clericus ordinatus agi debere et non alibi.
13. Cedit enim ad ignominiam et vituperium ecclesie cum clericus revocatur ad statum servilem.
14. Et si iudicio reddi debeat deponendus est vel degradandus antequam reddatur.

For the last four clauses of R.M. II.13, which resolve the question of a possible conflict of jurisdiction between ecclesiastical and secular tribunals, there is no parallel in Raymond.

- (1) Manumissio est dacio libertatis, nam quamdiu quis in servitute est manui et potestati suppositus est, et manumissum est liberatus a manu et potestate domini . . .
- (2) Habebit autem originem secundum quosdam⁵ a jure gencium a quo eciam dicunt servitutem habuisse originem
- (3) et cum antea uno communi nomine omnes appellarentur, ipso jure tria genera hominum esse ceperunt, scilicet liberi et his contrarium servi, et tertium genus liberti, scilicet qui desierant esse servi . . .
- (4) Alii dicunt quod sumpsit incium servitus ab ebrietate Noe et ita videtur a jure naturali . . .
- (5) Manumittere potest qui habet administracionem suarum rerum . . .

Raymond has before him Azo's Summa of the Institutes, but the relevant passage makes few changes in the text of Inst. I.5:

⁵ That is Azo.

R.M. II.14

De manumissione servorum

1. Manumissio est libertatis dacio. Nam quamdiu quis in servitute est manui et potestati domini sui subiectus est. Et cum manumissus fuerit liberatus est a manu et potestate domini sui.
2. Manumissio autem habuit originem a jure gencium.
3. Et cum antea jure scilicet naturali omnes liberi nascebantur et uno communi nomine homines appellarentur sed postquam jure gencium violencia servitutis libertatem invasit, sub isto jure libertatis que manumissio dicitur tria genera hominum esse ceperunt, scilicet liberi et his contrarium servi et tertium genus scilicet qui desierant esse servi et hi vocantur libertini.
4. Servitus sumpsit originem ab ebrietate Noe.
5. Manumittere potest quilibet habens servum dum tamen de licencia domini regis hoc faciat. Aliter servi nativi non possunt fieri liberi.

RAYMOND, SUMMA DE CASIBUS, III.17—*cont.*

- (2) Ceperunt autem iste manumissiones a jure gencium,
 (3) nam cum jure naturali omnes homines liberi nascerentur nec erat nota manumissio, cum servitus esset incognita, sed postea, quando jure gencium servitus invasit, secutum est beneficium manumissionis et, cum uno naturali nomine homines appellarentur, jure gencium tria genera hominum ceperunt esse, liberi et ex his contrarium servi, et tercius genus liberti, id est qui desierant esse servi.

It is more than likely, however, that the compiler referred directly to the Institutes, as his use of the word libertini in preference to liberti (at the end of the third clause) indicates.

The compiler makes no further use of the Summa de Casibus. In his treatment of dower, he has as his principal guide Book VI of Glanville. This book he incorporates (R.M. II. 16), but he supplements it with borrowings from other sources (R.M. II.15 and 17). The most obvious source for such romanesque material as he used would seem to be Raymond's Summa de Matrimonis, which was used also by Bracton. Assuming this to be the source then, though the doctrine is the same, the material has been recast. As will be seen, R.M. II.15.4. does, however, repeat almost verbatim a passage from the Decretals cited by Raymond, while R.M. II.17.5 appears to be a conflation of some words of Raymond's and a decretal cited by him. The possibility cannot be excluded that the compiler drew directly upon the Decretals and the common stock of canonist doctrine, but it seems more likely that he is indebted to Raymond.⁶

⁶ Raymond's *Summa* is an expanded edition of Tancred's treatise with the same title. But Tancred cannot be the compiler's source, for the changes introduced by Raymond are to be seen in R.M. There are parallels also in Azo, but the nearest parallels are with Raymond.

Raymond, DE MATRIMONIO, titulus 25

- (1) Donacio propter nupcias est quod sponsus sponse donat: huiusmodi autem donacionis proprium est ut, si paciscatur maritus de parte dotis lucranda uxore premortua,
- (2) tantum debet lucrari mulier de donacionibus propter nupcias premortuo viro. Lucratur maritus dotem tum ex pacto tum ex lege: ex pacto, ut si paciscatur de tota dote lucranda vel ejus parte; ex lege lucratur maritus dotem si mulier adulterium committit, nam factus divorcio propter mulieris adulterium, mulier dotem amittit.

There is here a reference to X.4.20.4:

Si mulier ob causam fornicacionis, iudicio ecclesie aut propria voluntate, a viro recesserit . . . dotem vel dotalem repetere non valetit,

some words of which R.M. 17.5 adopts.

Similiter, mortua uxore intestata, deficientibus liberis et propinquis, vir succedit uxori et lucratur dotem, et e converso.

- (4) In aliis autem casibus predictis et dos ad mulierem et donacio propter nupcias, soluto matrimonio, redit ad virum, nisi secus obtineat de consuetudine approbata.

There is here a reference to X.4.20.8:

Sane soluto matrimonio, sicut dos ad mulierem sic et donacio propter nupcias redit ad virum . . .

which R.M. II.15.4 follows.

R.M. II.15

1. Olim dicebatur donacio ante nupcias, hodie propter nupcias. Et quia hodie fit ante et post nupcias, ideo merito donacio propter nupcias nuncupatur.
2. Inducta est donacio propter nupcias ut per eam de dote consultum sit mulieri.
3. Quia soluto matrimonio, per donacionem (id est per res donatas que alienari non possunt) providebitur mulieri ut salva sit ei dos, quia de ea satisfieri poterit mulieri.
4. Soluto autem matrimonio sicut dos ad mulierem sic donacio propter nupcias redit ad virum.

R.M. II. 17

5. Quarto modo mulier perdit dotem si ipsa ob adulterium commissum iudicio ecclesie a viro suo recesserit.

ENGLISH AND FRENCH LEGAL METHODS

THE CIVIL PROCESS ¹

WHEN we compare things, we tend to notice more the differences between them than their similarities. The differences are indeed instructive and it is to them that I propose mainly to direct my attention when considering English and French legal methods. But if the differences are to be emphasised, it is as well to remember at the outset that, despite those differences, the end and object of legal process is very much the same in England and in France. We share a common stock of culture ; and, more than that, we are both West European nations who not only have derived our basic ideas from a common Christian fund, but, until towards the middle of the sixteenth century at least, were profoundly influenced by the Church whose authority up to that time we each expressly recognised. And in legal matters at any rate that influence was great : more direct perhaps in France, but not less powerful in England. It is for example really important to remember that justice, which is the final purpose of the law, means at least the same *kind* of thing in both countries, whatever difficulty we might have in defining that thing. Indeed it is in large part *because* we agree in our notion of justice that it is especially profitable to consider the difference between the methods which we use to attain to it.

Moreover, in comparative studies such as these, we do not seek to attribute praise or blame. Necessarily, I have my own prejudices, which I should at the outset declare. My bias is to be strongly in favour of the common law ; though the result is that sometimes—for bias does act strangely on occasion—sometimes I am led to see more

¹ The first of three talks given in the B.B.C. Third Programme, Feb.-March, 1955. The text is as broadcast. The second talk is published in [1955] Crim.L.R. 207.

good in the French system than a Frenchman is ready to admit. I suppose that if a man thinks very highly of a person or thing—as I do of the common law—he may become unduly irritated by what seems to him to be a wilful perversity; and by way of reaction he may praise unduly highly the foreign system of whose equal blemishes he may not be equally conscious.

But praise or blame as such is not our purpose. For example it is to my mind, for our purposes, only very indirectly relevant that the administration of criminal justice in France is being criticised in the English press—as I happen to think rightly—though the criticism here is but a pale shadow of the vehement criticism in France itself. The criticism is relevant for us only in so far as it may call our attention to the really essential features of the French process; and the criticism being, as I think, on the whole misdirected, it is not in this respect very helpful. For that is the object of comparative study—to try to see the essential features of each system with as much impartiality as may be, for the primary purpose simply of knowing: not primarily for the purpose of judging which is better or worse. No doubt with such knowledge it may be possible intelligently to reform; and reform is a reasonable purpose; but it is not presently ours. I do not wish to change either the French system or the English. I would like simply to know what each really is.

In these matters we are so nearly blind that it seems to be necessary to bring differences of the grossest sort forcibly to our minds in order to enable us to see that the thing with which we believed ourselves to be thoroughly familiar really had this or that fundamental quality, which, once we have seen it, we recognise as self-evident and as evidently capital. The French system, good or bad, if juxtaposed to the English, may bring into relief the character of the English. But the juxtaposition is not helpful unless it is intelligent. By an intelligent juxtaposition we necessarily gain knowledge of the French system also; and this reciprocal illumination is an object of comparative legal

studies. Between the two systems the comparative lawyer should stand impartial, trying only to see each more clearly in the mirror of the other. Personally I think it wise for a comparative lawyer to go beyond a cold impartiality, if he can, and to have a bias towards seeing the good points of the *foreign* system. For it is with law as it is with persons: we are apt to make the better acquaintance of those of whom we are ready, if possible, to think well. And in our case seeing that the French system has commended itself to a nation, the French, whose sense of justice is lively enough, it is not unreasonable to keep a presumption in its favour even when its methods differ from ours—though that does not mean raising a presumption against ours. The difference may be the difference between having blue eyes or brown: important enough no doubt, perhaps capital; but each may be equally though diversely attractive or effective.

By an intelligent juxtaposition to be brought to the observation of a critical difference and by that observation to be led to recognise an essential property of each system and especially of that system—our own—with which we believe ourselves to be thoroughly familiar: that is what is proposed. The simplest instance of what is proposed is a comparison between a *civil* action in England and in France. And in the matter of civil actions, it would I think automatically be believed that we ought to try to compare what happens in the Queen's Bench Division in the Law Courts on the Strand in an action in tort (a running down case for example) or in contract, with what we conceive to be similar actions at the Tribunal Civil de la Seine which sits in the even more august, and much more historic, surroundings of the Palais de Justice in Paris. Certainly the Tribunal de la Seine is the most important French civil tribunal of first instance, and evidently the Queen's Bench Division deals in first instance with the most important civil cases in England. Surely therefore the two should be comparable in a direct manner? I doubt very much if such a direct comparison is in fact reasonable; but clearly it ought to be tried.

The English lawyer's first reaction when attending at the presentation of an important civil case in Paris is, I am sure, one of disbelief and even dismay. In my own case I can still remember having been invited to attend what might fairly be described as a spectacular case—indeed I had been invited to it because it was spectacular. I am persuaded that that case was as bad an instance to offer to a foreigner as a fair sample of the French civil process as any that can be imagined. But I think that it was by reaction instructive. A very famous living French general, second only to de Gaulle in the public repute, was suing for libel a quite well-known author who was vigorously defending himself by a plea of justification and was represented by very well-known counsel. The libel was a vicious one: the author alleged that the general, who now had the reputation of being a leader of the French resistance, had in fact been a loyal supporter of the Vichy Government and, in the presence of a still living witness, had made to the notorious Laval, already executed for treason, proposals which evidenced not only that loyalty but a fanatic hatred of the English. It would be difficult to imagine, in the then state of public opinion, a more damning allegation. The author was quite simply saying that what he had written was true: the line of his book was that it was all very well for leading Frenchmen such as that general after the Liberation to be violently anti-Pétain, but if they considered a little what they themselves had said and done a very few years before they ought in decency to be somewhat more temperate in their condemnation, and certainly that general should be.

If an issue of that kind had to be determined between such parties in a civil action in England, there would have been a public furore. The cross-examination of the general and of the author by leading counsel would have made a Roman holiday and every newspaper in the country would have printed a verbatim report of the alleged witness's evidence: in court one would have had the impression that the entire nation was listening in hushed expectation to his every word. And it would have been surprising if the case

had not gone on for several days. In France, there was nothing of the kind. Admittedly there a civil action for libel is unusual—proceedings for libel there are usually criminal with the plaintiff tacked on as *partie civile*, as in the Kravchenko case: which will be remembered even in England and which in France occupied public attention more than enough. Perhaps the civil process was preferred in our case simply because it did avoid that publicity.

The civil hearing, by our standards, was odd indeed. It occupied some three hours—which was considered long. Nobody gave any evidence. The parties in France are still not competent witnesses in a civil action, though the court may order their personal appearance if it sees fit. The judges sat as graven images, saying not a word. Even counsel did not present a case, at least in our sense. They were mainly concerned in their statements to call the attention of the judges to some of the salient points of the story which they assumed that the judges would come to know through a study of the briefs or files—the *dossiers*—each was making ready to hand up to the court at the end of the hearing. Each made a moving peroration; but it would have been quite impossible from what was said or done in court for anybody, including the judges, to have come to any conclusion that day; and an English observer would suppose that it would be difficult or impossible for the judges themselves, after whatever deliberation, to make a satisfactory determination of the fact in issue between the parties, subsequently, by the mere study of the *ex parte* statements contained in each side's brief. What means of knowledge, if any, the judges may have is not known to the public, though it would of course be known to the parties. There was certainly at the hearing no clear and visible determination made of the fact in issue between the parties by any evidence publicly adduced: which is what an English observer would expect principally to be done in court in a civil action of this kind. The court's decision was announced, as is customary, a fortnight later: judgment was for the plaintiff, to whom the court awarded—no doubt

to mark its sense of the wickedness of the libel—two million francs, in France a sum more enormous proportionately than the £13,000 awarded in England the other day. The English press amply reported the English case, though it was of no public importance. Of the French case, which was of the greatest public interest, only one French newspaper reported the result in a single paragraph.

What is to be concluded from this? Most obviously that the English civil process is a process which includes, and as its chief ingredient, what we call a trial—a day in court when if there is an issue of fact to be determined between the parties, it is determined by evidence orally adduced that day and perhaps by the verdict of a jury—in the case of a libel almost certainly by such a verdict. And if there is a point of law to be determined there will be a complete oral examination of that point by contradictory argument of a sort which not only theoretically enables the single presiding judge there and then to reach the decision but actually in practice normally results in such final immediate decision. The French civil hearing, whatever it may be, is not in our sense a trial; and even the argument on a point of law is not a complete oral examination of the point.

The English observer may no doubt shrug his shoulder and be content to remain persuaded of the evident superiority of his own process—and indeed my own prejudice leads me to suppose that it may be superior, so far as the determination of an issue of fact is concerned. But I think that we are apt to suppose that if a Frenchman only knew what our civil process was he also would concur in our judgment of its superiority. That is not at all so. The informed Frenchman's reaction would be as vigorous as it was opposite. For him a jury trial interposed in the civil process would be a monstrosity; and the suggestion that that process should be so conducted that it might be *possible* to take the verdict of a jury would appear to him to be a misconception of the very nature of a civil dispute, and indeed generally about as helpful as the suggestion that a

properly conducted commercial arbitration should culminate in an ordeal by battle.

If we can bring ourselves to have patience with this obtuseness we may begin to see that the Frenchman has, of what is civil business and a civil court, a notion to which we have not adverted. If we glance at the Code Civil—the law administered by that court—we see that it is dominated by the ideas of the family and of property: the *état civil* (which it is awkward to try to translate), marriage and divorce, the relationship of parent and child, interests in land, the administration of estates and the law of succession, gifts and settlements and especially marriage settlements, and contracts—not for the purpose of commerce (for commercial law belongs to a quite separate court) but as modes of acquiring and transferring property. It is true that the Code Civil deals with torts also—with civil wrongs that is—a branch of the law whose bulk in England is exceedingly large and which has developed in France also but not proportionately. Nevertheless, so far as the Code Civil itself is concerned, the law of tort is an extremely minor part: it occupies five articles only out of 2281: it is part of the section which deals with modes of acquiring property, and is an item in the chapter entitled “Engagements arising without agreement.” It looks as if the draftsmen of the code were more concerned with the property aspect of torts—the monetary asset or liability resulting to the patrimony of the victim or the wrongdoer—rather than with that aspect of them which occupies us here, where the law of tort is the foundation of the rights and liberties of the subject, public as much as private.

From this inspection it may begin to appear that a civil action in France signifies something very different from a civil action in England. The twin of the Tribunal Civil de la Seine is not the Queen’s Bench Division of the English High Court. More nearly perhaps it is a Chancery Division to which no doubt Probate and Divorce business and much else has been assigned and from which for example Bankruptcy and Companies—odd companions in any event to

normal chancery business—have been removed. *Prima facie* the Chancery Court is occupied, much more than the Queen's Bench Division, with matters which are the subject of the Code Civil. Such a juxtaposition is at least much more helpful to our understanding.

The procedure of the two courts—the French civil court and the Chancery court—is more nearly similar, especially if we look to the procedure of the older Chancery. A jury trial is unknown in Chancery and even a witness action is a modern excrescence. The Chancery court operated—and appropriately operated—by way of affidavit and report: it was at home when it dealt with documents. The report process in fact very much resembles the process of “*expertise*” now used in French civil procedure: to which is allied the “*enquête*,” an inquiry conducted by a member of the Tribunal. The French civil tribunal operates as the Chancery court operated because that is in general the reasonable way of dealing with that kind of business which in France is termed civil business, and of which we recognise the strong Chancery flavour. Perhaps that procedure is not, in our view, very well adapted to the determination of issues of fact, especially perhaps in actions in tort; but the remedy, in a Frenchman's opinion, would not be to subvert the procedure of the civil court by requiring it in general to adopt the procedure favoured by the Queen's Bench Division—a procedure in his view appropriate, if at all, only to a criminal cause. And indeed tortious actions and criminal prosecutions were nearly related and in England had a common origin. More probably, if the Frenchman would consent to so revolutionary a suggestion—the French are in fact more conservative than the English—he would perhaps regard as more appropriate a segregation of tortious actions from civil business proper, if really they cannot adequately be dealt with by the existing French process: though I think that he would suppose that generally at least they could be.

However, even if we are right, and if we may properly complain of a misadaptation of process in France so far as

concerns the determination of some issues in fact, it should be borne in mind that that misadaptation is nothing like as gross as many of those which we cheerfully perpetrate in England: where for example we are willing to commit the bulk of matrimonial disputes to the determination of magistrates whose business, but for those disputes, is mainly if not exclusively the criminal law. To use a court whose habits and whose process are predominantly criminal in character for the solution of quarrels between husbands and wives is really quite extremely odd; and it would much surprise a French observer if he retained a capacity for surprise after an encounter with our normal civil procedure.

The relation of the Tribunal Civil to our Chancery court enables us not only to begin to grasp what the French may mean by civil business (and therefore also of the process appropriate to it) but also to be conscious of another great division which exists between us. In England, because a great deal of civil business was transacted in the common law courts (in the end virtually indiscriminately between the Court of King's Bench, the Court of Common Pleas and the Exchequer Court) we became accustomed to use for the transaction of civil business a process of which parts—and especially the trial—greatly resembled the process used for the determination of criminal causes with which also the Court of King's Bench was much concerned. We take in England much less of a distinction between the civil and criminal process than is to be found in France; and the absence of this distinction tends greatly to humanise our criminal process.

The kind of distinction which there exists we can better imagine if we consider what would have been the case in England if civil business had predominantly been allocated to a Chancery court using a chancery process of report and affidavit and if the criminal trial had developed on its own in the Court of King's Bench. There would no doubt have been a great gulf between the two. In France, and upon the Continent generally, there is a great gulf fixed between the civil and the criminal process. Logically, there is much

to be said in favour of such a distinction: for the purposes of the criminal and the civil process are distinct enough. It is I think to the advantage of the criminal process that it should have had continuous contact with the civil process: I am not sure that this cohabitation has been of equal advantage to the civil process. May I put it this way: it seems to me at least arguable that there are a good number of properly speaking civil disputes (civil in the French sense of the word) which are more conveniently and more appropriately dealt with by a chancery process—by a process, that is, resembling the French civil process—than by a process which is proper to the proof of the guilt of a criminal, and which produces a proof with as high a degree of formality and publicity as does the English criminal process.

These considerations lead us also to understand, in perhaps a more helpful context, a distinction between French and English legal methods of which the existence at least is generally appreciated. The French believe in specialised courts with specialised function: there is a *civil* court to transact civil business using an appropriate civil procedure; a quite distinct *commercial* court to deal with commercial affairs also with its own process; an *administrative* court—which I happen greatly to admire—concerned with complaints against the administration and equipped with a third type of procedure all its own; and, of course, a *criminal* process, which is properly regarded as entirely peculiar to itself. Whereas in England, despite a host of recently created tribunals, in the past we had, and in principle I think we still have, a single court, the High Court, with a jurisdiction which is both unitary and universal. May I interject that the civil court in France, even the most important Tribunal Civil de la Seine at Paris, is not only confined to civil business but in civil business has only a local jurisdiction? That the High Court in England is omniscient is due mainly to the power and the greed of the common law courts. They destroyed the local jurisdictions and Star Chamber also; they absorbed the Law Merchant, the Admiralty and the Ecclesiastical Courts; and

indeed in great part they assimilated to themselves the court of Chancery. In the High Court of England we find a concentration of judicial power of an unparalleled kind; and with that concentration goes an almost necessary tendency to treat in one and the same manner all the court's business, however diversified. It is really unreasonable to attempt to compare with a division of this Court even the Tribunal Civil de la Seine. That tribunal in our system more resembles a local county court, without indeed a monetary limit but with a stricter limit as to the kind of business it may transact. The French moreover have a strong, perhaps a misguided, sense of the need to bring justice to the doorstep of the litigant, as if it were a municipal gas or water service; and there are in consequence in France twenty-seven major civil and criminal jurisdictional districts, each with its own Court or Courts of Appeal and the districts are further sub-divided into 355 court areas.

It is a result of the multiplicity of courts, and of the consequent number of judges, that there exists that disparity between the status of judge which is so striking in England and France. In metropolitan France alone, excluding the *juges de paix* and the *magistrats debout*—I must pass over the meaning of these terms—there are about 2300 judges, *magistrats de siège*, exercising a criminal or civil jurisdiction. In England when we think of a judge, we think automatically and almost exclusively of a High Court judge—though of course we cheat ourselves when we do so, because we omit a whole host of persons (county court judges, recorders, chairmen of quarter sessions, commissioners of divorce, as well as a multitude of magistrates) by whom the vast bulk of judicial business actually is transacted. Still, we do instinctively identify the office of being judge in England with the office of a High Court judge. There are presently forty-one High Court judges;² and even if we include the Court of Appeal and the House of Lords the total number is but sixty-four—fewer than the number

² Including the Lord Chief Justice and the President (P. Adm. & Div.).

required to staff in France the single last Court of Error, the Cour de Cassation.

The High Court judge dominates the English judicial process. The process we use is a process appropriate for bringing a matter before a man of his importance and as occupied as he is for a speedy and personal determination by him. The French process also is appropriate for bringing the matter before the French judge. It is the difference in the instrument used—the French and the English judge—which largely explains the difference not only in the atmosphere of the court but in its process. In comparison with the English High Court judge the normal French civil judge of first instance is almost a minor civil servant. The English judge acts, or can act, with an authority and an intransigence impossible to his alleged French counterpart: indeed we do not find a like authority in France until we go over to the French administrative court. It is the English judge's authority and power which created and support the English civil process—and by consequence it is a process incomparably more drastic and more absolute than the French civil process. The English process is the process of a court having a plenitude of power and accustomed to transact business of the greatest public importance. It is almost by accident that this drastic process is used to determine litigation by private individuals concerning their family and property relationships. The French civil process is the process of a court of limited jurisdiction concerned, mainly at least if not exclusively, with that kind of litigation. It is a process appropriate to that business—that is to say usually effective to transact that kind of business, with the dispatch and the authority regarded as convenient.

The few and elementary differences we have collected give rise to reflections of this kind. It may be sensible to have courts with limited jurisdiction and specialised function—indeed it looks as if, in England also, they will be multiplied. Suitably devised such courts may be adequate for their purpose and may do justice conveniently and comparatively inexpensively between the parties resorting

to them. But the more they are multiplied and specialised, the less they will partake of that character—surely a very admirable character—which in our minds is in England associated with a High Court judge, who as a member of an exceedingly small and highly selected group is accustomed to exercise, and exercises, a plenitude of jurisdiction. It really would be very silly to complain that the specialised and multiplied jurisdictions do not have that character when by the nature of the case they cannot have it.

On the other hand, it is no doubt a grand thing to have a court such as the High Court in England; but the grandeur of the thing is little consolation to the victim of injustice if it is so grand that it cannot by him effectively be used to procure himself justice. My prejudice leads me to believe it to be of critical importance that, if we can, we should maintain in England an instrument having the degree of power and the efficacy of the High Court. But it really is equally critical that the apparently efficacious instrument should actually retain its efficacy spectacularly to repress injustice by the most powerful of defendants: we may be paying too high a price if we do but maintain a museum piece of antiquated machinery which is found to be incapable of functioning precisely at that juncture for which alone it was sensible to retain it. And it is no less important that the instrument, if formidable, should be used appropriately. It can be questioned whether the High Court process is appropriate to a good number of the instances in which it is used in England. A comparative lawyer may even wonder whether the French courts were not acting sensibly in disposing of the libel action even by a famous general in the manner in which they did dispose of it. Is it better, is it necessarily wiser, to treat such a case as undoubtedly in England it would be treated?

C. J. HAMSON.

THE SIGNIFICANCE OF MILITARY NECESSITY IN THE LAW OF WAR

IN an age of shifting values the transformation which seems to be taking place in the doctrine of military necessity may attract little attention. But it is nonetheless disquieting, seeing that in the past the idea of military necessity undoubtedly operated to restrain belligerents from committing the worst savageries of war. Although something of an anachronism in both theory and practice it is perhaps salutary to recall a principle which at least gave some semblance of humanity to what is essentially barbarous.

Various meanings have been ascribed to the term "military necessity"—or "necessity in war," as it is sometimes called.

In the first place, it has been used to signify the nature and degree of armed force that may lawfully be exercised in the destruction of enemy life, limb, and property by laying down the principle that "no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances."¹ But, as one writer has pointed out, "most infringements of the laws of war directed against the enemy have been defended by both parties as self-defence against an enemy's illegal attack, as reprisals, and not as measures based merely on emergency inflicted upon an innocent party."² Thus, Admiral Doenitz contended at Nuremberg that passenger ships were included in the German orders to attack without warning only when passenger traffic ceased to be innocent and when those vessels, by reason of their speed and heavy armament, became particularly dangerous to submarines.³ He also maintained that throughout the war the basic

¹ Phillipson, *International Law and the Great War* (1915), p. 132.

² Weiden in *Grotius Society*, 24 (1939), p. 112.

³ *Proceedings of the International Military Tribunal* (H.M.S.O. paper edition), Part 19, pp. 1-2

German order to submarine commanders was not to attack merchant vessels recognised as neutral; that there were certain accurately defined exceptions to this order, about which the neutral Powers had been notified, affecting in the first place ships which conducted themselves in a suspicious or hostile manner,⁴ and secondly, ships in announced operational areas.⁵

Secondly, military necessity has occasionally been taken to denote those exceptional circumstances of practical necessity contemplated by express reservations to be found in several articles of the Hague Regulations and other Conventions in regard to acts otherwise prohibited. The general principle of international law in the matter is that conventional and customary rules of warfare are always binding upon belligerents and cannot be disregarded even in case of military necessity. The Preamble of Hague Convention No. IV of 1907 states that the Regulations following were formulated with "a desire to diminish the evils of war, so far as military requirements permit." Consequently, many writers considered that military necessity was discounted when the rules of warfare were drawn up, and their strict observance is only to be relaxed when reprisals are warranted. In the trial of Field-Marshal von Manstein, the Judge Advocate advised the Tribunal that the doctrine has no application to the laws of war except where the latter are actually qualified by explicit reference to military necessity; and that it had already been taken into consideration when the rules were formulated.⁶ Again, in *Re Krupp and others*, the Tribunal said:

"The contention that the rules and customs of warfare can be violated if either party is hard pressed

⁴ On September 28, 1939, the first German note was sent to neutral Governments requesting them to warn their merchant vessels against suspicious conduct such as changes in course, the use of wireless upon sighting German naval forces, dimming of lights, or non-compliance with a request to stop, and the like.

⁵ Schmitz in *Z.ö.V.*, 8 (1938), p. 671, suggested that the London Naval Protocol of 1936 did not apply to attacks upon vessels in operational war zones on the ground that by entering such zone the vessel interferes with naval operations, and that her conduct is therefore analogous to a "persistent refusal to stop."

⁶ Transcript, p. 3140.

in any way must be rejected on other grounds. War is by definition a risky and hazardous business . . . It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.”⁷

However, the fact that some conventional rules of warfare are qualified by express reference to military necessity⁸ would appear to indicate that “the rules themselves represent the standard of conduct at which commanders are to aim, but, as practical men, the delegates have recognised that there must be some cases when the observance in the strict letter of the provisions will be impossible . . . No legislation can specify beforehand the precise circumstances which would justify a commander in failing to act on the rules laid down, but no circumstances can justify the violation of the fundamental principle of these rules, which prohibit the infliction of needless suffering to individuals and mere wanton destruction of property.”⁹

But it is the third interpretation of military necessity which has given rise to widespread controversy and has caused the expression to be regarded by so many with suspicion and opprobrium. According to this notion military necessity furnishes the basis of the excuse or pretext put forward by

⁷ *United Nations War Crimes Reports*, 10 (1949), pp. 138-9.

⁸ See, for instance, Articles 1 and 15 of Geneva Convention of 1906; Articles 23 (g) and 54 of the Hague Regulations; Article 19 of Hague Convention V of 1907; Articles 2 and 6 of Hague Convention IX of 1907; Article 7 of Hague Convention X of 1907; and Articles 29 and 49 of the Declaration of London, 1909.

⁹ Pearce Higgins, *The Hague Peace Conferences* (1909), p. xii. And see the *British Manual of Military Law* (1929), Chap. xiv, para. 434. See also the following decisions of the United States Supreme Court: *Mitchell v. Harmony* (1851) 13 Howard 115, at p. 180; *United States v. Russell* (1870) 13 Wall. 623; and *Juragua Iron Co., Ltd. v. United States*, 212 U.S. 297.

a belligerent for violating some well-established rule of international law applicable to the conduct of hostilities. The source of this concept of military necessity is to be found in the German maxim *Kriegsraison geht vor Kriegsmanier*. The more moderate protagonists of this school agree that laws and customs of war must ordinarily be respected, but contend that the obligation may be displaced by urgent necessity. When the observance of rules of warfare endangers the safety of armed forces the limitations which they impose on hostile licence may be disregarded. This proposition is supposedly founded on a fundamental right of self-preservation and purports to acknowledge the futility of demanding strict compliance with rules inconsistent therewith. It has been supported on the grounds that commanders will invariably act on it despite any rule of law to the contrary, and that the plea of self-preservation—formally recognised by some systems of municipal law as a defence to a criminal charge—must clearly apply with even greater force in war, when much more is at stake. The doctrine is said to incorporate into international law a distinction, recognised in German criminal law, between “the right of self-defence (*Notwehr*) and the state or condition of necessity (*Notstand* or *Notrecht*). Self-defence involves the exercise of a right against aggression, while the ‘law of necessity’ allows a belligerent to violate the right of innocent third parties whenever it is necessary to safeguard his own interests.”¹⁰ “*Die Notstandshandlung die Rechte unschuldiger dritter Personen verletzt, während die Notwehr einen unberichtlichen Angriff zurückweist.*”¹¹

But this contention has been refuted by de Visscher

¹⁰ Garner, *International Law and the World War* (1920), vol. i, p. 197. Nevertheless, some German writers, in reference to paras. 52 and 54 of the German Penal Code, pronounced themselves strongly against a right of necessity. See, for instance, Geyer, *Encyc. der Rechtswissenschaft* de Holtzendorff, *Rechtslexicon*, V° *Notstand*.

¹¹ Kaackenbeeck in *Grotius Society*, 4 (1919), p. 229. Para. 54 of the Penal Code declared to be not punishable an act carried out in a state of necessity not imputable to the agent who acted for the protection of his life or safety of his body.

who maintains ¹² that the provisions of the Civil and Criminal Codes invoked by the German jurists did not justify the wide extension given to the doctrine; that the conception of *Notstand* was not only controversial in Germany but foreign to almost all modern systems of law, and should therefore not be employed as basis for a juridical principle applicable to the relationship between States. Others have asserted that the maxim ceased to possess legal significance once usages had developed and hardened into customary and conventional rules of warfare.

The danger of leaving to the judgment of an individual, whom the laws of war seek to restrain, the decision to carry out acts regarded as normally improper is clearly manifest. In the words of Hyde: "It allows too much to rest upon the character, temperament, and training of a commanding officer and permits, in consequence, opposing armies under similar circumstances to resort to widely differing practices without exposing either to just charges of misconduct."¹³

In the *German High Command Trial*, the United States Military Tribunal pointed out that were military necessity to confer on a belligerent the right to do anything that contributed to the winning of a war, "it would eliminate all humanity and decency and all law from the conduct of war, and it is a contention which the Tribunal repudiates as contrary to the accepted usages of civilised nations."¹⁴ The translation of such a theory into practice would lead almost inevitably to grave abuse. It would frequently be exploited as a pretext for the commission of unlawful acts, and cause injury to innocent persons. Furthermore, it is undesirable for a State or its representatives in any capacity to act as judge *in rem suam*.

Although neither French nor Italian criminal law seems to confer a positive right to commit an act objectively unlawful, both acknowledge necessity to be an excuse in certain circumstances, while extreme necessity, seeing that

¹² *R.G.D.I.P.*, 24 (1917), p. 90.

¹³ *International Law* (1945), vol. iii, p. 1802.

¹⁴ *War Crimes Reports*, 12 (1949), p. 93.

it destroys freedom of choice, exonerates the individual concerned from criminal responsibility.¹⁵ In the face of dire necessity a military commander may be convinced that the safety of his forces will be gravely menaced by strict adherence to rules of warfare. The situation confronting him may be so critical as to justify or at least excuse some breach or relaxation of the law on that particular occasion.¹⁶ In other words, "a belligerent is justified in disregarding a rule of war whenever conformity to the rule would involve his destruction."¹⁷

But it has been said that the binding force of the Hague and Geneva Conventions is "seriously impugned by the doctrine of military necessity put forward by German writers and officially countenanced by the German Government. The doctrine reduces the existing restraints on hostile licence to the level of mere discretionary observances dependent on the view of the local situation entertained by the officer in command; whilst it serves to relax the sanction of the laws of war at a time when the temptation to disregard them is greatest."¹⁸

¹⁵ See Article 64 of the French Penal Code and Article 49 (3) of the Italian Penal Code.

¹⁶ See Bellot in *Grotius Society*, 2 (1916), p. 31. And see the famous letter written by Count von Moltke to Bluntschli in regard to the views of the Prussian General Staff: *Revue de Droit International*, vol. xiii, p. 79. Oppenheim, *The Future of International Law* (1921), p. 60, wrote: "It must be admitted that the general principle of the law of nations, that such acts as are absolutely necessary for self-preservation may be excused even though illegal, is applicable to the law of war also—but mere *Kriegsraison* never extends so far as to dispense with enacted rules of war." But Oppenheim seems rather to have in mind such a danger as threatens the very existence of the State itself, and thus calls into play its fundamental right of self-preservation. See also Weiden, *loc. cit.*, p. 110; Rivier, *Principes du Droit des Gens* (1896), vol. i, pp. 277–8; Strupp, *Das Internationale Landkriegsrecht* (1914), p. 134; von Liszt, *Das Völkerrecht systematisch dargestellt* (10th ed., 1915), p. 202, who in his 1913 and 1915 editions considerably modified his earlier views on military necessity in accord with the progressive development of the law of war, and who cites Article 22 of the Hague Regulations; Kohler, *La Théorie de la Nécessité légitime et les événements de notre temps* (1914), pp. 32–3. For a consideration of the doctrine of *rebus sic stantibus* in relation to the fundamental right of self-preservation, see de Visscher, *loc. cit.*, p. 103.

¹⁷ Garner, *op. cit.*, vol. i, p. 197. Max Huber in *Zeitschrift für Völkerrecht*, vol. vii, pp. 351–74, attempted to draw a distinction between *Staatsnotwendigkeit* (State necessity), *Kriegsnotwendigkeit* (necessity of war), and *Militärische Notwendigkeit* (military necessity). Strupp, *op. cit.*, pp. 4–6, approved these distinctions; but see de Visscher in R.G.D.I.P., 24 (1917), p. 97, who considers them useless and arbitrary. And see Hershey in A.J.I.L., 9 (1915), pp. 557–8.

¹⁸ Pitt-Cobbett, *Cases on International Law* (1937), vol. ii, pp. 122–3.

Some German writers have claimed a philosophical basis for the doctrine in the Hegelian theory of the hierarchy of values according to which the more important of two conflicting interests must prevail; and that "when the legal system does not provide the means of resolving the conflict, the law must give place to facts and give right to the victors."¹⁹ In so far as it equates military necessity with mere expediency this proposition has an ominous ring. The maxim *omnia licere quae necessaria sunt ad finem belli*, first presented systematically by Lueder, later became embodied in the 1902 German *Kriegsbrauch im Landkriege*, and received juridical exposition in the writings of such German publicists as Meurer and Strupp. The latter asserted that "les lois de la guerre peuvent être légitimement méconnues quand cette méconnaissance apparaîtra comme l'unique moyen d'exécuter une opération de guerre, c'est-à-dire, de la mener à bonne fin."²⁰

It is undoubtedly important to distinguish dire necessity based on a fundamental right of self-preservation from simple military expediency or advantage. The German concept of military necessity has been widely interpreted "to embrace more than the right of self-preservation and to include acts of mere military interest, utility, and convenience. According to this view any act without which the object of the war cannot be attained is legally justifiable on the ground of military necessity."²¹ Carried to its

¹⁹ Fichte, *Grundlagen des Naturrechtes* (t. III, p. 253). Kohler, *op. cit.*, discusses the Hegelian theory of values and asserts that the maxim *Not kennt kein gelot*, invoked by the German Chancellor as a pretext for the invasion of Belgium in 1914, was not peculiar to Germany, and that legitimate necessity constitutes a right. And see the article by E. L. in *Clunet*, 44 (1917), pp. 473-4.

²⁰ *Das Internationale Landkriegsrecht* (1914), pp. 7-8. The German concept of military necessity has been traced to the writings of G. F. von Martens, who attempted to distinguish *raison de guerre* from *manière de guerre*. Weiden in *Grotius Society*, 24 (1939), p. 116, says that the doctrine put forward by de Martens, and later modified by Kant, Feurbach and Liszt, was supported by most German authorities and prevailed in that country until the Hague Conventions. He goes on to point out, however, that Liszt, in the sixth edition of his treatise, deserted their ranks and correctly adopted the opposing view. See Oppenheim, *International Law* (7th ed. by Lauterpacht, 1952), vol. ii, p. 231, and the authorities cited in footnote 6. The latter maintains, on the other hand, that the doctrine was not generally accepted by German writers.

²¹ Garner, *International Law and the World War* (1920), vol. i, pp. 290-1.

logical conclusion such a theory would elevate to an absolute supremacy military and strategical considerations entailing the very negation of international law. Moreover, it is generally agreed that this extended meaning of the term military necessity became untenable once the leading Powers, including Germany, had endeavoured to reconcile the legitimate demands of war with basic postulates of humanity by subscribing to the Hague Convention of 1899 concerning the laws and customs of war on land.

Although it became firmly established that expediency alone does not entitle a belligerent to disregard rules of warfare an English authority, writing during the Second World War, was still able to assert that "this doctrine of necessity, without restriction to war, is definitely in vogue at present in Germany, and that German jurists justify under it, or under reprisals, all the atrocities committed by Germany during the Great War and the War of 1939 onwards."²²

The contribution of war crimes tribunals towards clarifying the meaning of military necessity was limited by the nature of the cases brought before them. In general, the plea of military necessity as a defence to a criminal charge was raised either in connection with the treatment by a belligerent of prisoners of war and unarmed enemy persons, or in relation to the deportation of civilian inhabitants from and the devastation of property in occupied enemy territory. Thus, it was held that an immediate danger threatening the security of a military unit did not justify the execution of a prisoner of war²³; and that operational necessity of safeguarding a submarine did not render lawful the shooting by members of its crew of survivors from a torpedoed merchant vessel who had succeeded in reaching rafts and floating wreckage.²⁴ The second and more important category embraced the legality of the so-called scorched-earth policy carried out by German forces in the course of

²² Wheaton, *International Law* (7th ed. by A. Berriedale Keith, 1944), vol. ii, pp. 168-9. ²³ *Re Thiele and Steinert*, *War Crimes Reports*, 3 (1948), p. 56.

²⁴ *The Peleus Trial*, *War Crimes Reports*, 1 (1947), p. 1. . .

large-scale retreat from occupied territory. In the trial of Field-Marshal von Manstein, the Judge Advocate advised the Tribunal that the mass deportation of the civilian population could not be defended, if at all, on the ground of military necessity.²⁵ But in the *German High Command Trial* and in the *Hostages Trial*²⁶ it was held that during retreat under arduous conditions military necessity will allow to the commander a great deal of latitude and may, in fact, warrant a policy of devastation. However, the Courts seemed disinclined to enlarge the doctrine of military necessity beyond that countenanced by express reservations appearing in the Hague and Geneva Conventions.²⁷

This cautious policy has been maintained by the International Law Commission of the United Nations in its formulation in 1950 of the principles of international law recognised in the Charter and Judgment of the Nuremberg International Military Tribunal.²⁸

But the notion of military necessity has become so clouded as a result of the four Geneva Conventions of 1949 that its legal significance in warfare must now be considered highly problematical. The responsibility for this state of affairs must be attributed to those who drafted the text of the Conventions, seeing that the latter fails to reveal uniformity of expression in the matter of military necessity. Thus, the following phraseology seems to have been employed indiscriminately: "in case of urgent necessity,"²⁹ "unless rendered absolutely necessary by military operations,"³⁰ "should military operations prevent,"³¹ "in so far as

²⁵ And see the *German High Command Trial*, *War Crimes Reports*, 12 (1949), p. 93.

²⁶ *War Crimes Reports*, 8 (1949), pp. 68-9.

²⁷ Probably the most important reservation is that contained in Article 23 (g) of the Hague Regulations (annexed to Hague Convention No. IV of 1907), according to which it is particularly forbidden "to destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war."

²⁸ The Commission adopted the definition of war crimes contained in Article 6 of the Charter of the Nuremberg International Military Tribunal of August 8, 1945, which included "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

²⁹ As, for instance, in Convention I, Art. 34, and Convention IV, Art. 57.

³⁰ Convention IV, Art. 53.

³¹ *Ibid.*, Art. 111.

military considerations permit,"³² "so far as operational requirements permit,"³³ "within the bounds set by military or security considerations,"³⁴ "taking account of the imperative necessities of security of the State,"³⁵ "where absolute military security so requires,"³⁶ "subject to imperative reasons of security,"³⁷ "subject to urgent reasons of security,"³⁸ "rendered necessary by imperative military necessities,"³⁹ "made necessary by imperative military requirements,"⁴⁰ "not justified by military necessity."⁴¹

Although it may be argued that the destruction of public and private property in occupied territory is still expressly prohibited "except where such destruction is rendered absolutely necessary by military operations," the presence in the Conventions of so many other qualifying expressions of similar purport renders the task of interpreting the former even more formidable than was the case under the Hague Regulations.

Unless the leading Powers succeed in adopting some objective criterion of military necessity there can exist no reliable basis for determining the legality or justification of apparent transgressions from the strict letter of the regulations. Not only would tribunals have to fall back upon a subjective estimation of supposed mitigating circumstances but the responsibility of military commanders would become unjustly burdensome.

The United States Memorandum of 1919 concerning the principles which should determine inhuman and improper acts of war,⁴² while attempting to formulate some practicable

³² Convention I, Art. 42, and Convention IV, Arts. 16, 18 and 83.

³³ Convention II, Art. 27.

³⁴ Convention IV, Art. 30.

³⁵ Convention I, Art. 8.

³⁶ Convention IV, Art. 5.

³⁷ *Ibid.*, Arts. 62 and 78.

³⁸ *Ibid.*, Art. 63.

³⁹ Convention I, Art. 8.

⁴⁰ Convention IV, Art. 55.

⁴¹ Convention I, Art. 50, and Convention IV, Art. 147.

⁴² Attached to the Report of the 1919 Commission on the Responsibility of the Authors of the War: see *American Journal of International Law*, 14 (1920), pp. 150-1.

standard of conduct for belligerents, was not sufficiently precise to be of much value in an age of mechanised and scientific warfare. It proposed that "the test of guilt in the perpetration of an act, which would be inhuman or otherwise reprehensible under normal conditions, is the necessity of that act to the protection of national safety or national rights measured chiefly by actual military advantage. The assertion by the perpetrator of an act that it is necessary for military reasons does not exonerate him from guilt if the facts and circumstances present reasonably strong grounds for establishing the needlessness of the act or for believing that the assertion is not made in good faith."

One may be excused for suspecting that the inclusion in the Geneva Conventions of 1949 of the numerous qualifying expressions already mentioned does little more than pay lip-service to humanitarian impulses unlikely to be realised in practice. The orthodox concept of military necessity in the law of war had undoubted relevance at a time when some limit could be imposed upon the orbit of hostilities, but it appears to be manifestly incompatible with warfare of a kind that must stamp our generation as the most inhuman in modern history. Well might Spaight say: "The historians of the future will be puzzled by, or will wax cynical about, the conclusion of the new Geneva Conventions in 1949, and the failure of the Powers who agreed to them to do anything to regulate also those methods of war which, if continued, will make the humanitarian provisions of those Conventions read like hypocritical nonsense."⁴³

Thus, at the present time, States are faced with a fundamental moral problem involving the possibility of fixing the point at which necessities of war ought to yield to requirements of humanity. The latter cannot be looked upon as a nebulous ideal which is liable to vary according to circumstance. Otherwise, civilisation will be left to the tender mercy of those belligerents who identify military

⁴³ *Journal of the Royal United Service Institution*, 99 (1954), p. 61.

necessity with the right to employ such methods of destruction as are calculated to defeat the enemy with the least expenditure of time and resources. Each participant would cry *salus populi suprema lex* and the German conception of *Notrecht*—which has been described as a negation of law—would form the basis of a national policy in which barbarism was kept in check solely for reasons of expediency and self-interest.

It is imperative that States shall continue to regard the doctrine of military necessity as an instrument of justice that will regulate violence by striking a balance between the needs of a belligerent and the necessity inherent in all military operations on the one hand, and the equities of those, belligerent and neutral, combatant and non-combatant, against whom force is employed on the other. The practical demands of military necessity must not be exploited as an excuse for lawlessness, nor must the exceptional situation justifying some relaxation of rules of warfare become enlarged into general practice. The advent of thermo-nuclear weapons has effected a revolutionary change in the character of warfare. In consequence, the necessity of engaging in those measures considered to be indispensable for achieving the ends of war will largely cease to be dependent upon the local judgment of the individual military commander. The question will rather be one of strategic planning for which the State itself—and, in the last resort, public opinion—must be held responsible. In the words of Doctor Albert Schweitzer: “The essential fact which must stir our conscience, and which we should have been aware of for a long time, is that the more we become supermen, the more we become inhuman. The horror of this experience must arouse us out of our stupor so that we can direct our wills and our hopes towards the coming of an era in which there will no longer be wars.”⁴⁴

N. C. H. DUNBAR.

⁴⁴ Address in acknowledgment of the Nobel Prize for Peace: Oslo, November 4, 1954.

RECENT LEADING SCOTTISH CASES

By D. M. WALKER, PH.D., Advocate, Professor of Jurisprudence
in the University of Glasgow

Several points of interest and importance arose in *Mackinnon v. Iberia Shipping Co.*, 1955 S.L.T. 49. M. sued his employers for injuries sustained on board a Scottish ship at a time when it was anchored within the territorial waters of the Dominican Republic. The first point was whether this was Dominican territory or not, and it was held that it was, even though the ship was not tied up to the shore and the delict in question in the case had had no connection whatever with the shore. Accepting the doctrine of territorial waters it is hard to see how this could be avoided although the difficulties and even absurdities involved in a case of a vessel coasting along and passing in and out of the territorial waters of, it may be, several States must be admitted. The contention, founded on *Reresby v. Cobetas*, 1923 S.L.T. 719, that the ship was a floating enclave of Scotland and carried Scots law along with it, so as to make the *lex loci delicti* Scots law could not be upheld in view of the decision of the Privy Council in *Chung Chi Cheung v. R.* [1939] A.C. 160. Had the vessel been at sea the law of the flag would have ruled but, despite arguments from common sense, no distinction can be drawn between presence on Dominican territory and presence in Dominican territorial waters. In such circumstances the action had to be fought on the basis that the *lex fori* was Scots law and the *lex loci delicti* was Dominican law and for such cases *Naftalin v. L. M. S. Ry.*, 1933 S.C. 259; 1933 S.L.T. 193, and *McElroy v. McAllister*, 1949 S.C. 110; 1949 S.L.T. 139, supply the tests of actionability. It was conceded that by Dominican law a claim of damages for patrimonial loss arose but as the pursuer had made no express averments that he was entitled by that law to claim solatium as well the case was continued to enable him to amend his pleadings to cure that defect. Doubtless in default of amendment to the

INTER-
NATIONAL LAW
—Locus delicti—
Solatium.

required effect the court would be bound to exclude from proba-
 tion the averments so far as directed to the recovery of solatium.
 It was accepted on all hands, following *Naftalin* and *McElroy*,
 that solatium was an independent and substantive right and not
 merely an element in a general claim of damages. But the court
 seem to have overlooked the vital distinction that these cases
 were cases of *actio injuriarum*, brought by an individual for loss
 caused by the death of a close relative, while *Mackinnon's* was a
 case of personal injuries, of an individual claiming for injuries
 done to himself, and it does not follow that solatium is the same
 thing in both kinds of cases. The writer sought to show in 62
Jur.Rev. 144 *et seq.* that in actions of the *McElroy* type solatium
 was indeed an independent right, being derived from the ancient
 claim for assythment for the slaughter of a relative, but that in
 personal injury claims of the *Mackinnon* type solatium was merely
 a name for the element of damages given in recognition of pain
 and suffering. The proper question for averment here, if indeed
 further averment were necessary at all, was whether Dominican
 law gave a right to an element for pain and suffering as well as
 for monetary loss in the claim competent under that law for
 personal injuries, for what an English lawyer would call "general
 damages" as well as "special damages." No question of inde-
 pendent right truly arose: the court took the wrong meaning of
 solatium by citing cases which were claims by surviving relatives
 and not in point because in them solatium is a different kind of
 thing and is a distinct right. This part of the decision in
Mackinnon is therefore unsatisfactory and, it is submitted,
 incorrect. In view of the way the court disposed of the case it
 may be, however, that the pursuer did not suffer prejudice.

The same point of the distinctness and separateness of
 solatium as a substantive right arose (this time correctly) in
Hewitt v. West's Gas Improvement Co., 1955

SOLATIUM— S.L.T. 207, which was a motion for a new trial
 Challenge of on the ground of excess of damages, the argu-
 awards—Compari- ment turning largely on whether the amounts
 son of aggregate awarded to the various members of the family
 awards. of a deceased must be considered separately or
 must be aggregated for the purpose of considering whether or not
 they were so unreasonable and excessive as to justify allowing a

new trial. Lord Carmont remarked *obiter* that the rights to solatium and to damages for patrimonial loss were separate rights. "The practice of taking a verdict combining these rights and the assessment in a single sum of damages to cover both claims has resulted in judges and juries coming to regard solatium as a mere element making up a general right to damages." The proper practice was, he said, to separate the awards and there were obvious advantages both to the parties and to the court in doing so. Where, as in the case before the court, the awards were combined and a lump sum award made to each pursuer the court could not break down the sum into its constituents but must consider the aggregate award. There would seem accordingly to be a good case for reverting to an older practice and claiming separately for solatium and for patrimonial loss, and having the judge or jury make distinct awards. This is the more reasonable in that, as Lord Carmont observed, "the character of the right [to solatium] had been for a long time put within the limits little removed from nominal damages." The judgments in this case of *Hewitt* suggest that where several relatives sue together for the death of their breadwinner their claims must be considered in the aggregate, unless possibly in a case where the awards to the several pursuers have differentiated the elements of solatium and loss of support, in which case it appears that the claims might be considered individually, though if a new trial were to be allowed, it would have to be on all the claims and not merely on the excessive or inadequate one: *Campbell v. West of Scotland Shipbreaking Co.*, 1953 S.C. 173; 1953 S.L.T. 130.

The doctrine of *res judicata* is usually considered to be so narrow that it seldom avails defenders who are being harried by a determined pursuer. In *Matuszczyk v.*

National Coal Board, 1955 S.L.T. 101, Lord Strachan gave the principle a distinctly wider meaning. M. sued the N. C. B. for damages, averring breach of common law duty of care, and was unsuccessful; he then sued again for damages arising out of the same accident, founding this time on breach of statutory duty, alleging different grounds of fault which could not have been investigated on the pleadings in the former action. Lord Strachan held that it was a case of *res judicata* and dismissed the

RES JUDICATA
—Common law
fault and statutory
duty.

action. On the one hand it is patent that pursuers may not be allowed, particularly in reparation actions where many grounds of fault and breaches of duty under common law or statute or both may be founded on to bring action after action trying one ground of fault after another. On the other hand, "competent and omitted" is not a plea open to a defender and a pursuer is not bound to state all his possible averments of grounds of action under pain of being later told that he might not save one up; in other words, must a pursuer marshal all his batteries in the front line at once? The accepted test of *res judicata* is that the later action is barred if it is (a) between the same parties; (b) dealing with the same subject-matter; and (c) has the same *media concludendi*. Here (a) and (b) were satisfied and the only difficulty was whether averments of common law fault and breach of statutory duty are the same or different *media concludendi*. On the one hand Lord Kinnear said in *N. B. Ry. v. Lanark and Dumbarton Ry.* (1897) 24 R. 564, 572, that "the two suits must be the same so that the specific point raised in the second has been as directly raised and concluded by the judgment in the first." That could hardly be said here: the point of fault under statute was not raised at all in the first action. Again it is clear law that a dismissal on relevancy is not *res judicata*: *Menzies v. Menzies* (1893) 20 R.(H.L.) 108; hence if M. had here failed at common law on relevancy and not at the trial he could have tried again, founding on statutory fault. It is hard to see why a different rule applies because the failure was at the trial, because the evidence and the standard of proof and the shifting onus may be quite different in the one case from the other. The only real support for the view the learned Lord Ordinary took comes from the principle that breach of statutory duty is "statutory negligence": *McMullan v. Lochgelly Iron Co.*, 1933 S.C.(H.L.) 64; 1934 S.L.T. 114; *Hamilton v. Anderson*, 1953 S.C. 129; 1953 S.L.T. 77. But it is one thing to say that because common law imposes liability for fault and negligence and statute may do so also they are in principle the same thing, claims grounded on *culpa*, and quite another to say that "faulty system" and "breach of section x of the Coal Mines Act" may be equated. The fundamental justification for this decision is that it prevents a pursuer pressing his defender with one ground of fault after another; it is a distinct widening of the principle of *res judicata*.

and it remains difficult to say that common law fault and breach of statutory duty are the same *media concludendi*.

Another noteworthy decision was that of *Glasgow Corporation v. Central Land Board*, 1955 S.L.T. 155. The action related to the reduction of the determination of certain development charges, but it raised incidentally the thorny problem of the privilege claimed by Crown departments against calls for discovery of documents. Since the Crown Proceedings Act this privilege has become one of the most obnoxious obstacles to justice against the Crown. In the first place the court accepted the contention that the Central Land Board was a department of the Crown under the Secretary of State for Scotland (at least *quoad* Scotland). The position of the many Boards set up since 1945 is not entirely clear: the B. T. C. is not a department of the Crown: *Tamlin v. Hannaford* [1950] 1 K.B. 18, but now, relying partly on *obiter dicta* in that case and partly on the construction of the statute establishing the Central Land Board, it has been held to be a department of the Crown, with the unfortunate result that it enjoys the privileges of the Crown in litigation. It seems very doubtful if this was really intended (*cf.* Hood Phillips' *Constitutional Law* (1952), p. 310), and it seems perfectly possible that the Board's functions should "be exercised on behalf of the Crown" without its being either a servant or agent of the Crown, but rather an independent contractor. There is warrant for the decision but it does seem unfortunate, particularly in view of the consequences, and there are as many indications one way as the other. The Board then having established that it fell to be treated as a Crown department resisted a call for production of certain documents by tendering a certificate under the hand of the Secretary of State for Scotland that the documents "belonged to a class of documents which, for the proper functioning of the public service, it was necessary to withhold." The calls related to minutes, circulars and documents tending to show the methods by which the amounts of development charge in respect of the developments dealt with in the summons were to be calculated. The court was accordingly forced again to consider whether it

**CENTRAL LAND
BOARD—
Whether Crown
department—
Disclosure of
documents—
Privilege.**

could override the certificate and demand disclosure of the documents called for, and in the result it declined to do so. The case is notable for the analysis of the older Scottish authorities on the topic, notably the case of *Earl v. Vass* (1822) 1 Sh.App. 229, in which Lord Chancellor Eldon reversed a decision of the Court of Session on the advice of the Lord Chief Justice of England who had stated to him that he (the L.C.J.) would never have allowed the documents to be admitted in England! On such pernicious irrelevancies in London is some of Scots law founded. The conclusion was that the inherent power of the court to override objections had always been recognised in Scotland, at least prior to 1942 (the date of *Duncan v. Cammell Laird*, *infra*) though it never seemed to have been actually exercised. The position since 1942 was more doubtful since in *Duncan v. Cammell Laird* [1942] A.C. 624 (an English appeal) *Earl v. Vass* was referred to as an authority for the principle there laid down that the Crown's objection to disclosure of a document or even class of documents is final if validly taken. This view had certainly been taken in the later cases of *McKie*, 1952 S.C. 206; 1952 S.L.T. 191; *Stuart*, 1953 S.L.T. (Notes) 74; and *Ellis v. Home Office* [1953] 2 Q.B. 135. Lord Russell thought that *Duncan* did not overrule Scottish practice, so that the inherent right to overrule objection to production still resided in the court though this was not a case for exercising it. Lord Carmont seemed to think *Duncan* did away with the old Scottish practice: this seems very doubtful, since Scottish law and practice were not in issue and never argued: *Earl v. Vass* was mentioned while the case was awaiting judgment, not in argument. Lord Sorn thought the inherent power was now mainly of theoretical interest. In the result whether or not the court could have done so, it did not seek to override the objections. This result is profoundly unsatisfactory. The Crown Proceedings Act, 1947, s. 47, in allowing diligence for documents against the Crown, preserved the right to withhold on the ground of "injury to the public interest," and the Bill was criticised in the House of Lords on this point so much so that the then Lord Chancellor, Viscount Jowitt, undertook to ask the Prime Minister to draw the attention of Ministers to the importance of their considering personally whether the public interest really demanded that the documents be not disclosed. But nothing in Parliament binds for the future and there is a serious and general feeling of disquiet that Crown

departments are now objecting regularly and automatically to production of any of their documents. Their practice was criticised by Devlin J. and by Jenkins and Morris L.JJ. in *Ellis, supra*, and extrajudicially by Denning L.J. (*The Changing Law*, 1953, pp. 41-2). There is a widespread feeling that justice is not being seen to be done and is possibly not being done in fact. Objection is too much a matter of common form. It was justifiable in the case of police reports in *McKie*, but in the present case it is very hard to see what public interest would be injured if the pursuers or even people generally knew on what principles development charges were determined; it would seem in the public interest that these methods (if indeed there are any methods and principles) *should* be disclosed. One is left with the very uncomfortable feeling that departments do not want to disclose and will always automatically claim privilege for all their documents just as everything in some wartime offices was Top Secret. In the result no person has any confidence in the certificate produced; as in *Ellis*, whatever the court may say, the public attitude is one of disbelief and distrust. This privilege has replaced the older privileges of the Crown in litigation as a serious abuse and a crying injustice: one cannot but feel that the right is being scandalously abused by departments to save themselves trouble and cover up their weaknesses, a part of the tyranny of the modern bureaucracy, which is not amenable to law or reason. In this case, as in others, justice is *not* being seen to be done and nobody has any confidence that it is being or even can be done. The Board assesses development charges; they decline to disclose the principles they have worked on; how then can they be challenged? For all the courts can do, they may as well have decided the amounts by the toss of a coin. Is this British justice?

Conveyancers would do well to note the decision in *Hynd's Executor v. Hynd's Trustees*, 1955 S.L.T. 105, elucidating the statutory provision governing notarial execution of wills and containing a valuable conspectus of the earlier law on the subject. The salient point is that the holograph docquet must be (but had not been in *Hynd's* case) written in the presence of the testator and of the witnesses, and the witnesses should have

**WILL—
Notarial
execution.**

signed in the presence of the testator and not later. It is an important addition to the cases on this subject, which has proved to have more pitfalls than might at first appear.

The same class of practitioners are those primarily concerned with the decision in *Ross's Judicial Factor v. Martin*, 1955 S.L.T.

SUCCESSION

—Common calamity.

117. Two sisters died together in a common calamity, each leaving all her property, in the events which had happened, to the other with gifts-over, the same in each will, in the event of the other sister predeceasing. Lord President Cooper, sitting in the Outer House, awarded the estates to the ultimate legatees on the basis that the wills were identical, and the legatees were the same under each will and so each of them got a double legacy. The Second Division, and now the House of Lords, disapproved this possibly equitable solution holding that both estates fell into intestacy. The legatees could not claim under either will because they could not establish under either will that the other sister had predeceased, an essential condition precedent to their taking. This decision is unfortunate but inevitable. It suggests again that Scotland would do well to have a statutory presumption (as England has) to cover cases of deaths in a common calamity, and also that pending such legislation draughtsmen of wills would be well advised to bear in mind the possibility of simultaneous death and such common calamities as deaths in air and road accidents and not to draft wills in terms allowing for such intestacies as this.

In *Hunter v. Hanley* a doctor was sued for damages for professional negligence. At the trial Lord Patrick directed the

DOCTOR— Professional negligence— Standard of care.

jury (1954 S.L.T. 303) that to entitle them to find for the pursuer "there must be such a departure from the normal and usual practice of general practitioners as can reasonably be described as gross negligence . . . there must be a serious departure from normal practice, if that normal practice has been proved, and the serious departure must involve a substantial and serious fault." The First Division have now (1955 S.L.T. 213) allowed a new trial, holding that the direction was

incorrect. (Jerome Frank would, of course, laugh at this, having regard to his contention (in *Courts on Trial*) that juries do not pay attention to the precise verbal formulation of the charge, if indeed they attend to it at all, but decide the issue according to their intuition. The writer has great sympathy with this view but, be that as it may, the Division allowed a new trial.) It was emphasised firstly, and very rightly, that deviation from established practice was not necessarily evidence of negligence, and that in medical issues there was ample room for genuine differences of opinion on questions of diagnosis and treatment (and it might have been added that lack of success or even untoward results of treatment equally prove nothing by themselves). The view taken by the court was that *where deviation from normal practice was alleged* (and this, be it noted, is not every case) there must be shown to be (a) a usual and normal practice; (b) non-adoption of this; and (c) that the course actually adopted was one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. The extent of deviation is not the test; hence Lord Patrick's references to "serious departure from a normal practice" and to "gross negligence" were wrong, even assuming that "gross negligence" meant such a marked departure from the normal standard of care as no man of ordinary skill would display. Lord Russell tended to equate "gross negligence" with negligence or recklessness such as would infer criminal responsibility, and Lord Sorn indicated that "gross" negligence had no place in modern law. The case is of great importance in that it is the only modern Scottish case laying down the standard of care demanded of a medical man. The only other Scottish case is *Farquhar v. Murray* (1901) 3 F. 859 which is not helpful. The question is then whether the test is satisfactory. It is not wholly so: should the tests not be "man of *reasonable* skill . . . acting with *reasonable* care"? "Reasonable" is not the same as "ordinary": "ordinary" may well be less than "reasonable," though one hopes it is not, and "reasonable" necessarily implies regard to the individual's experience and qualifications, and to the whole circumstances of the case. "Ordinary" has regard to average standards. The word "ordinary" conflicts with established authorities in England such as *Lanphier v. Phipos* (1838) 8 C. & P. 475, *Rich v. Pierpont* (1862) 3 F. & F. 35, and *R. v. Bateman*

(1925) 41 T.L.R. 557 (which was approved and followed in *Crawford v. Campbell*, 1948 S.L.T. (Notes) 91, which does not appear to have been cited in *Hunter*). But even accepting the test as laid down by the court, the way for the pursuer in such a case as *Hunter* is not easy as all three desiderata must be proved, the third being crucial. The case is valuable but not entirely satisfactory and, of course, it does not touch on cases where no question of deviation from practice is in question. In such cases is the test "ordinary care" or "reasonable care"?

RECENT LEADING ENGLISH CASES

By W. A. ELLIOTT, M.C., B.L., Advocate, and of the Inner
Temple, Barrister-at-Law

The decision of the House of Lords in *Carmarthenshire County Council v. Lewis* [1955] 2 W.L.R. 517, affirming the decision of the Court of Appeal, is novel in some respects.

One is familiar with actions for damages by parents of young children against school authorities for allowing their children to stray on to the highway and so be killed or injured. But in this case the plaintiff suing the local education authority was the widow of a man who was killed when his lorry struck a telegraph post trying to avoid a four-year-old child who had strayed from the defendants' nursery school on to the road. The question of general importance raised was whether there is a duty on the occupiers of premises adjoining a highway to prevent young children (*i.e.*, children of such tender years as to have no "road sense") from escaping on to the roadway so as to endanger other persons passing thereon.

NEGLIGENCE—
Child on highway
causing accident
—Whether education authorities
liable to widow
of driver who
was killed.

At first sight the legal situation involved is not dissimilar to the question of liability of occupiers of property for animals escaping on to the highway. It was indeed contended by counsel for the defendants that, if an occupier was not liable for the escape of an animal, why should he be any more liable for the escape of a young infant who from the standpoint of reasoning powers was much the same as a sheep or any other domestic animal? In an interesting review of the history of the rule of non-liability of occupiers for animals escaping on to the highway, Goddard L.C.J. explained that the rule arose when the open field system of farming prevailed and most roads ran through unenclosed country. The rule could not be extended in the twentieth century to "escaping" children in built-up areas.

It appeared that the child in question had been left unattended for a few minutes by his schoolmistress and that he thereafter walked out of his classroom, across a playground, through a

gate that was either open or easily openable and thence out on to the roadway where the accident occurred. Did the education authority owe a duty to the plaintiff's husband in these circumstances or was he outside the area of potential danger as in *Bourhill v. Young* [1943] A.C. 92? It was held (Lord Oaksey dissenting) that the education authority was liable to the plaintiff in damages, since the unexpected fact that in the temporary absence of the teacher (who, on the evidence, was not negligent) it was possible for so young a child to wander from the school premises on to the highway, through a gate which was either open or very easy to open, disclosed negligence on their part. The *ratio decidendi* of this important case is succinctly stated by Lord Tucker as follows:— "Persons in charge of tiny children in premises adjoining a busy highway owe a duty to persons using the highway to take reasonable care to see that such children shall not during school hours escape unattended on to such highway."

In *Bevan v. Bevan* [1955] 2 W.L.R. 948 a husband had entered into a separation agreement whereby he agreed to pay his wife £9 a month for her maintenance. On the outbreak of war in 1939 the wife was voluntarily resident in Vienna and she remained there throughout the war. The husband ceased paying the instalments on the outbreak of war on the ground that the terms of the separation agreement had then been abrogated at common law as being contrary to public policy. The wife subsequently brought an action against her husband claiming the instalments due and alleging that, as they fell due, they should have been paid to the Custodian of Enemy Property, from whom she could subsequently have received them. The husband maintained that this was a clear case where further performance of the contract would have involved intercourse with the enemy and its performance would also have benefited the enemy as the wife was then resident in enemy territory; accordingly in 1939 the contract had been abrogated. The court held that, in the circumstances, public policy did not require that the agreement should terminate on the outbreak of war, and therefore further performance of the contract was not abrogated. Although the wife was an "enemy"

**CONTRACTS
CONTRARY TO
PUBLIC POLICY**

—Separation
agreement
between husband
and wife—Main-
tenance instal-
ments requiring
to be paid to
enemy territory.

within the Trading with the Enemy Act, 1939, nevertheless, as the contract still subsisted at common law, the husband was subject to the provisions of section 7 of the said Act and orders made thereunder which required him to pay the sums due to the Custodian of Enemy Property on his wife's behalf. As he had not done so, the wife was entitled to recover. The judgment of Sellers J. was based mainly upon the case of *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219, which was a case involving payment of debt by instalments, where the instalments fell due for payment after the war had commenced and it was held that the outbreak of war had not abrogated or discharged the debt. The instalments of maintenance were also considered analogous to "the concomitants of rights of property, which even so far as executory are not abrogated" by an outbreak of war—to use Lord Dunedin's phrase in *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.* [1918] A.C. 260, at p. 267.

In *Regina v. Rowe* [1955] 2 W.L.R. 1056 an accused person, on conviction, was sentenced to a term of imprisonment and, having given notice of appeal against conviction, died in prison. His widow thereafter sought to continue with the appeal. The Court of Criminal Appeal, however, held that they could not entertain the appeal because the widow had only a sentimental and not a legal interest in having the conviction quashed. It would have been different if the sentence had been one of fine as in *Hodgson v. Lakeman* [1943] 1 K.B. 15, for then, as executrix, the widow might have had an interest in quashing the conviction to recover the fine for the benefit of the deceased's estate.

**CRIME—Appeal
—Death of appellant—Application
for leave to
appeal by widow.**

In the judgment of the court, a widow can never have a legal interest to appeal against her deceased husband's sentence of bodily imprisonment. But with great respect there are people in certain positions or with certain business connections whose very *conviction* (regardless of the type of *sentence*) could have adverse financial repercussions and in such a case it is submitted that executors might have a legal interest to appeal against a sentence of imprisonment.

The Law Reform (Married Women and Tortfeasors) Act, 1935, provides that a wrongdoer may recover contribution from any other wrongdoer "who is, or would if sued have been, liable in respect of the same damage." The Law Reform (Miscellaneous Provisions) Scotland Act, 1940, provides in similar terms and accordingly the English decision in *George Wimpey & Co., Ltd. v. British Overseas Airways Corporation* [1954] 3 W.L.R. 932 is of some interest to Scottish lawyers.

CONTRIBUTION BETWEEN JOINT TORT- FEASORS—
Action against one time-barred —Whether contribution still permissible.

A man who had been injured in a collision between vehicles owned by the two parties to the case brought an action against them more than a year after the accident. The trial judge held that both parties were to blame but that the action against the Airways Corporation was time-barred and accordingly the whole damages fell to be paid by the private company. The private company thereupon attempted to claim that they were nevertheless entitled to contribution in terms of the 1935 Act. They argued, with some justification, that it would be quite inequitable if a private defendant were to be robbed of his right to contribution from a public authority merely because a third party chose to delay bringing his action. This argument, however, was rejected by a majority of the Court of Appeal and also by the narrow majority of three to two in the House of Lords. It is interesting to note that Lord Keith of Avonholm dissented on the view that "if sued" could not be interpreted to refer to any other time than when the cause of action arose. Lord Reid was of the majority opinion.

The seeming injustice of this case stems, of course, from the different periods of limitation once attached to actions against private persons and public authorities. Now by virtue of the Law Reform (Limitation of Actions, etc.) Act, 1954, the different periods of limitation have been assimilated. The situation could only now arise where a plaintiff sued one defendant immediately prior to the expiry of the new three-year period of limitation so that there was no time left to call in the second defendant before the *triennium* had expired.

Certain observations of Viscount Simonds and Lord Reid in *Inland Revenue Commissioners v. Baddeley* [1955] 2 W.L.R. 552, 559, 566, to the effect that a trust for the provision of a recreation ground for the community may be supported as charitable unless the class of beneficiaries is too narrow—were applied in the more recent case of *Re Morgan* [1955] 1 W.L.R. 738. The relevant bequest in the latter case was of a sum of money for the provision of a public recreation ground for the benefit of the inhabitants of a particular parish. Evidence was filed to the effect that in the view of the parish council a recreation ground as such was not required, because the village already possessed a cricket ground and a football pitch; but there was need of a parish hall or gymnasium. It was held that there was a valid charitable bequest and that, in the circumstances, it ought to be carried into effect by way of a *cy-près* scheme. The English law of charities is inapplicable in Scotland except in taxation cases, but it is conceivable that such a case might involve taxation questions as, for instance, the assessment of conveyances of ground to stamp duty, which was in fact the issue in *Baddeley's case supra*.

CHARITY—
Recreation ground
—Gift for a
parish—Whether
valid charitable
gift.

RECENT PRIVY COUNCIL CASES

Att.-Gen. for New South Wales v. Perpetual Trustee Co., Ltd., and Others ([1955] 2 W.L.R. 707) was an appeal from

**POLICE-
CONSTABLE—
Crown's claim
for loss of
services.**

the majority judgment of the High Court of Australia, affirming the judgment of the Supreme Court of New South Wales in favour of the respondents on a demurrer to an information which, on behalf of the Crown, claimed damages for the loss of services of a policeman as the result of the alleged negligent driving of a motor-vehicle by one of the respondents. The information alleged that the first and second respondents were the executors of the will of a testator and, as such, the owners of a certain motor-vehicle, that the vehicle was being driven on a public highway by the fourth respondent as agent for the third respondent, and that one Bertrand Leslie Hayden, a member of the police force of New South Wales, who was travelling in a tramway-car, received bodily injury, disabling him from performing his duties as a member of the police force, when the vehicle was negligently driven against the tram. During his period of disability, and while he continued as a member of the police force, he was paid the salary and allowance appropriate to his office, although the Crown during this same period was deprived of his services as a member of such police force, and on his discharge he was paid, and would continue to be paid, a pension in accordance with the provisions of the Police Regulation (Superannuation) Acts, 1906 to 1944, whereas but for such disablement he would not have begun to receive a pension in accordance with the provisions of the said Acts for a long time.

The Attorney-General, on behalf of the Crown, claimed to recover the salary and allowances paid as aforesaid and to be reimbursed in respect of the moneys paid and which would thereafter be paid to Hayden pursuant to the said Acts. The amount claimed was £5,050 3s. 9d. The respondents delivered a defence pleading the general issue and denying the allegations contained in the information, and each of them demurred to the information saying that on the argument of the demurrer it

would be contended that the declaration was bad in substance on the following, among other, grounds: (1) that it disclosed no cause of action; (2) that the action *per quod servitium amisit* did not lie at the suit of the Crown for the loss of the services of a member of the police force. The relevant provisions of the Police Regulation Act, 1899-1947, of New South Wales were sections 4 (1) (4), 4a (1), 5 (1), 6 (1) (2), 9, 10, 12, 18 (1) (2), 19 (1) and 27.

The Supreme Court of New South Wales gave judgment on the demurrer for the respondents, Street C.J. holding that the case was completely covered by *The Commonwealth v. Quince* (1944) 68 C.L.R. 227). The High Court, by a majority, dismissed the appeal from that decision; but Dixon C.J. stated that he felt constrained to follow the decision in *Quince's* case (*supra*), and that, had the matter been *res integra*, he would have held that the action was maintainable.

The Board stated that references in the Act to the "office" of a constable and to his powers and duties at common law made it desirable to say something about that ancient office, and that that was the more important because, unless the action *per quod servitium amisit* was held to extend to every case in which what was, in any context, called service was rendered by one who was called a servant it was essential to define with what precision was possible the nature of the service rendered and the relation in which he who rendered it stood to him to whom it was rendered. It did not appear to their Lordships that the matter was concluded by recalling that under the Act a constable taking the statutory oath was deemed to be bound to "serve Her Majesty as a member of the police force" or that he might be referred to as a servant of the Crown. After a detailed review of the relevant matters and authorities the Board said that in their opinion the facts in *Quince's* case (*supra*), at least as clearly as those of the present case, supported the view that the master and servant relation, on which the action *per quod servitium amisit* rested, was wholly different in kind from the relation of the Crown to a member of the armed forces, whether Field-Marshal or private soldier, and that a rule of law which applied to one should not be applied to the other unless there was compelling authority to do so. The review of the case law on the subject had shown that that was far from

being the fact. Their Lordships were of opinion, entertained by all the judges of the High Court, that the case of the constable was not in principle distinguishable from that of the soldier.

There was, in their view, a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he was said to serve. The constable fell within the latter category. His authority was original not delegated, and was exercised at his own discretion by virtue of his office: he was a ministerial officer exercising statutory rights independent of contract. The essential difference was recognised in the fact that his relationship to the Government was not in ordinary parlance described as that of master and servant. Nor, as would appear from quotations which had been made and others which might have been made from the dissentient judgments in *Quince's* case (*supra*) and the present case, would a different view have been taken on this point by judges who had come ultimately to a different conclusion. It was rather on what had been called the second aspect of the question that the difference arose. Their Lordships, differing with great respect on this part of the case from the judgment of Latham C.J. in *Quince's* case (*supra*), and from Dixon C.J. and Williams J. in the present case, thought that this form of action should not be extended beyond the limits to which it had been carried by binding authority, or at least by authority long recognised as stating the law. Their review of the relevant case law showed that, where in recent times it had been extended to cases of persons in the public service who (to repeat the now familiar words) were not servants of the Crown in such a sense that the ordinary law of master and servant determined the relation of the parties, the extension had been made without argument or deliberation. The form of action appeared, as Lord Sumner said in *Admiralty Commissioners v. S.S. Amerika* ([1917] A.C. 38, at p. 60), to be a survival from the time when service was a status. That service lay in the realm of domestic relations. It would not be in accord with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he could be called a servant at all, was the holder of an office which had for centuries been regarded as a public office. The appeal was accordingly dismissed.

The Commonwealth v. Quince ((1944) 68 C.L.R. 227) approved. *Bradford Corporation v. Webster* ([1920] 2 K.B. 135) and *Att.-Gen. v. Valle-Jones* ([1935] 2 K.B. 209), in which the only question was the measure of damages, explained. *Rex v. Richardson* ([1948] S.C.R. (Can.) 57), *United States v. Standard Oil Co.* ((1946) 67 S.C. 1604), and *dictum* of Lord Sumner in *Admiralty Commissioners v. S.S. Amerika* ([1917] A.C. 38, at p. 60) considered. *Att.-Gen. and Minister for Justice v. Dublin United Tramways Co., Ltd.* ([1939] Ir.R. 590) disapproved.

M. Takim & Co. v. Fazal Kassam Velji ([1955] 2 W.L.R. 991) was the appeal from the decree of the Court of Appeal for Eastern Africa (November 1, 1952) reversing a decree of His Britannic Majesty's Court for Zanzibar (November 28, 1951).

LOCAL CONTRACT NOTE—

The appellants (the plaintiffs), by their **Exemption from stamp duty.** plaint dated May 15, 1951, alleged that by a contract in writing dated June 20, 1950, they bought from the respondent 20,000 lb. of fair quality cloves at the price of 95s. a 100 lb. to be delivered between November 1 and 30, 1950. The respondent did not deliver any of the cloves. The appellants claimed as damages 8,800s., being the difference between the contract price and the market price of cloves on November 30, 1950. By his amended defence, dated July 20, 1951, the respondent denied that the document of June 20, 1950, had any legal effect. He alleged that it was a note or memorandum made by a broker and, not being duly stamped, was not admissible in evidence or enforceable in law. The trial judge gave judgment for the present appellants (the plaintiffs), and the East African Court of Appeal reversed that decision.

The contract was headed "Local Contract Note." It stated that the seller had sold the goods to the buyers through a named broker on the conditions then set out. Among the "Other Conditions" it was stated: "The seller and the buyer have made bargain with signature. That is all." There followed the signature of the broker, after which came: "Note—The above-mentioned goods have been sold on the conditions written above

which are acceptable to us . . . ,” and the note was signed by the seller and the buyers. The relevant statutory provisions are contained in the Sale of Goods Decree (Laws of Zanzibar, 1934, c. 81) and the Stamp Decree, 1940 (No. 5 of 1940) (Zanzibar).

No question arose as to quantum. The respondent did not dispute that if the document referred to was admissible it contained or evidenced a contract which he had broken, but he submitted (1) that the document was a broker's note or memorandum within article 41 of the First Schedule to the Stamp Decree, 1940; (2) that it was not duly stamped and therefore could not be admitted in evidence for the purpose of the Sale of Goods provisions. Article 41, under the heading “Stamp Duty on Instruments,” stated: “Note or memorandum sent by a broker or agent to his principal intimating the purchase or sale on account of such principal—(a) of any goods of the amount or value of forty shillings or over; twenty cents.” The appellants admitted that if both those propositions were established they could not bring themselves within section 3 (1) of the Sale of Goods Decree and that the claim must fail. Section 3 (1) provided: “A contract for the sale of any goods . . . shall not be enforceable by any court in the Protectorate unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay not less than ten per cent. of the price thereof in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.” The appellants submitted that the note was not a broker's note within article 41. They further submitted that, if it was, it was duly stamped. The original of the document was in Gujarati, and the case proceeded below on an agreed translation. The broker was acting for the buyers and not for the seller.

The trial judge distinguished *Vagani & Co. v. Lakhani, Ltd.* ((1949) 16 E.A.C.A. 5) and held that the present document did not intimate a purchase or sale, but was a draft of proposed terms to which the parties, by signing, could, if so minded, agree. If either party refused to sign there would be no contract, and not a contract which was unenforceable because of the absence of a note or memorandum. He relied on the words which appeared just above the broker's signature: “the seller and the

buyer have made bargain with signature," and construed those words not as referring to some other signed document but as anticipating the signatures at the foot, which would alone make the document a contract. The Court of Appeal felt unable to distinguish *Vagani's* case (*supra*) (in which a document similar in some respects had been held to be a "broker's note" within article 41) and dismissed the claim.

The Board stated that in neither court did much reliance appear to have been placed on the important term which was introduced in the latter part of the note below the broker's signature. As a matter of construction that term was, in the opinion of the Board, outside anything with which the broker had dealt, and had therefore to be accepted by the parties if there was to be a contract. In other words, that made clearly right the trial judge's conclusion that the document until signed was not an intimation by the broker of a purchase or sale. It was therefore outside article 41, and was exempt from stamping under article 5 (1) (a) of the First Schedule. The respondent's contention failed and he was liable for his breach of contract.

It was unnecessary, the Board stated, to rely on or consider the admissibility of the surrounding circumstances which were given in evidence. The broker in fact personally took the document first to the seller, who was not his principal, and obtained his signature before taking it to the buyers. That was the course of events which would have been anticipated on the construction of the document set out above. It was sought to rely on evidence of custom, but that did not arise on the view which they (the Board) took on construction. The appellants submitted that apart from the "new term" and the words on which the trial judge relied, the form of the document took it outside the words of article 41. Normally, a broker's note was a bought or sold note reciting a sale or purchase according to the party to whom it was sent. It was not, as this was, bilateral in form. It was unnecessary to decide that point, but brokers might be well advised to reconsider a form of document which had given rise to the present litigation and to *Vagani's* case (*supra*).

Though the second point did not arise, the Board would deal briefly with it. The proviso to section 19 of the Stamp Decree stated: Provided that any instrument chargeable with duty of

. . . shall be stamped at or before the time of execution, or the date of the instrument, whichever shall be the earlier." On that part of the case the Board said that the word "at" in the phrase "at or before" could not mean simultaneously with signing, and must therefore cover a reasonable time after signing. But the scope of the preposition "at," in its context in section 19, would in a similar case in future where the question arose require careful consideration. The appeal would be allowed.

Edwin G. Baker v. National Trust Co., Ltd., and Others ([1955] 3 W.L.R. 42) was an appeal from a majority judgment

**EMPLOYEES
AS BENE-
FICIARIES—**

**Invalid charitable
bequest.**

of the Supreme Court of Canada. A testator, who died in September, 1947, provided by his will dated June 23, 1938: ". . . my said trustees shall hold [the balance of my residuary estate] as follows: To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of the Canada Life Assurance Company and for the dependants of such employees of the said Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the board of directors of the said [coy.] as they the said board of directors, in their absolute discretion shall from time to time decide." The administrators of the testator's will asked whether the bequest of the residuary estate was a valid charitable bequest.

The Board stated that the true construction of the bequest must first be determined. In the event of a certain determination a question of much difficulty arose—whether a gift in perpetuity for the relief of poverty confined to employees of a particular employer and their dependants was a good charitable trust. In the view which their Lordships took that question did not fall for decision. To explain how the question arose, and the issues raised on construction, it was necessary to recall Lord Macnaghten's definition of charity in *Pemsel's* case ([1891] A.C. 581, at p. 583): "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts

for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." To qualify as a charity a gift must be "for the benefit of the community or of an appreciably important class of the community" (*Verge v. Somerville* [1924] A.C. 496, at p. 499). A gift for the education of a group of employees of a particular employer was not a charity (*Oppenheim v. Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297). Ancient authority existed for supporting a gift for the relief of poor relations. The correctness of the decision of the Court of Appeal holding good a gift to relieve the poverty of employees of a particular employer in *Gibson v. South American Stores (Gath & Chaves, Ltd.* [1950] Ch. 177) was expressly reserved in *Oppenheim's* case (*supra*).

The first question of construction arose on a submission by counsel on behalf of the Public Trustee for the Province of Ontario, the argument being that there was a general charitable trust for "indirect" benefits which was not restricted to the class who were to receive "direct" benefits. On that view a *cy-près* scheme should be established. That construction was based mainly on the words "in perpetuity" and "directly" in the bequest. The Board stated that they could not accept it. The words "in perpetuity" marked the distinction between charitable and ordinary trusts. The word "directly" was not inapt though it might be surplusage. The employees were to be the testator's direct beneficiaries, and it would be immaterial that others might benefit indirectly. Very plain words would be needed to restrict a trust to "indirect" benefits; nor was it clear what the words would mean. The only beneficiaries within the bequest were the employees and ex-employees and their dependants.

The second question turned on the meaning in their context of the words "for charitable purposes only." Those words looked back to the preamble of the Statute of Elizabeth. The relevant bequest must be read as if Lord Macnaghten's classification in *Pemsel's* case (*supra*) was set out in full after or instead of the words "for charitable purposes only." So read, it followed that the trustees were given a discretion to apply the income of the fund in perpetuity for the benefit of the employees in question

for any of the purposes enumerated in Lord Macnaghten's classification. If so, it was not in doubt that the gift as a whole was not a good charitable gift. If the validity of a gift in relief of poverty of such a group was open to doubt, it was clear that a gift for their education was not. That construction was put forward by the next-of-kin.

The alternative construction, submitted on behalf of the employees, involved the introduction of words, after the words "for charitable purposes only," which were designed not to explain those words but to avert the invalidity which ensued from reading them in their natural sense. The court was, in effect, asked to read the phrase as if the testator had directed his trustees to apply the income not for all or any of the purposes which the law recognised as charitable but only for such (if any) of those purposes as, having regard to the prescribed beneficiaries, could be regarded as charitable. While, perhaps, not an impossible construction, the circumstances of the case were such that the Board could not adopt it. That construction required that the testator must be supposed to have had some doubt whether all the divisions which Lord Macnaghten set out could be held to be charitable purposes with regard to the persons whom he intended to benefit. The only reasonable doubt would have been whether, if the other purposes were invalid, the purpose of relieving poverty among those beneficiaries would have been held valid. But the testator could not have supposed that persons in the employment of the company would be in poverty save in the most exceptional circumstances, nor could he have supposed that former servants of the company would often require financial assistance for that reason. Yet the sum directed to be held for charitable purposes was large and it appeared to the Board to be impossible in the circumstances to hold that the testator intended it to be held solely for the purpose of relieving poverty among his beneficiaries if it should prove that no other purpose could be sustained as valid. The gift was not a good charitable gift and the appeal would be dismissed.

RECENT LITERATURE

The Public Corporation. A Comparative Symposium. Edited by W. Friedmann, Professor of Law, University of Toronto, University of Toronto School of Law, Comparative Law Series Vol. I. 1954. London: Stevens & Sons, Ltd. Price £3 10s. net.

The Contracts of Public Authorities. A Comparative Study. By J. D. B. Mitchell, LL.B., PH.D., formerly Reader in English Law in the University of London, now Professor of Constitutional Law and History in the University of Edinburgh. 1954. London: G. Bell & Sons, Ltd. Price 25s. net.

Few subjects are of greater importance and interest at the present time than the topics dealt with in these two excellent volumes, which are welcome additions to legal literature and are notable and valuable not only for their informative accounts but also for the lessons which they teach, the suggestions which they make for future developments in their respective spheres. Both works will, it is to be hoped, have a wide circulation: they deserve the close study not merely of lawyers and administrators but also of all who are concerned with future social and political developments. The first book deals with the Public Corporation, national and international, perhaps most familiar to us in the modern nationalised industry in all its workings; the second discusses the contracts of public authorities, extending from Government Departments to the public corporation, so that though its field is more limited, the bodies dealt with cover a much wider range. Both works adopt the comparative method, *The Public Corporation* giving a survey of fourteen different countries, Professor Mitchell's book looking at the situation in Britain, America and France; and in this respect they are particularly welcome, comparative law being in Scotland a far too much neglected subject of study. The two volumes are at the same time of much practical value to the British lawyer in their reviews of the existing state of the law in this country and in what is indeed their main object—the tracing of likely and desirable future developments in our law. If Professor Mitchell's book is perhaps of chief value to the lawyer (and he says that it is through the courts that developments in this subject must come), Professor Friedmann's work, covering as it does many purely administrative aspects, is important to a wider field.

The University of Toronto School of Law has been trying for some years to reverse the outlook in Canada that has treated comparative law as not worthy of study or research in the law schools and, thanks to the Carnegie Corporation of New York, *The Public Corporation* has been published as the first volume in a series designed to show the legal, social and economic experience of a number of countries on certain common problems. The motive is a lofty one. As Dean Wright says in a foreword, law as a method of social control is in the modern world our only hope of survival; it is no longer enough to know

and accept one's own legal solutions: the development of the law elsewhere must be studied, and the more this is done the more readily will misunderstandings be removed, while opportunity is created for interchanging ideas on matters relating to law as a regulating and directing force in modern society.

The volume is directed to the study of the legal status and organisation of the public corporation. As Professor Friedmann says, it was begun on the assumption (ultimately proved correct) that most countries with a certain degree of social and industrial development though differing in many respects would, with ever-increasing state functions and the growing technical complexity of many of these, have developed public enterprises to carry out some of the new government functions otherwise than by Government Departments by some form of public corporation—a body midway between a pure public authority and a commercial private company. While the British and French nationalisations and the Soviet organisation of State industries are, Professor Friedmann points out, probably the only cases where the creation has been based on definite deliberate political and legal theory, most other countries having developed the public corporation empirically without any definite theory and without much uniformity, the concept of the public corporation is shown by the survey to rank among the general principles of law recognised by civilised nations.

The book is divided into four parts. The first contains fourteen articles on a general pattern by learned contributors upon the situation in fourteen countries which have developed the public corporation. Of the fourteen, six are in the Commonwealth, four in Europe and the other four are represented by Great Britain (contributed by the Editor), U.S.A., U.S.S.R. and Israel. Many of the articles have a valuable bibliography. Present conditions there prevented the inclusion of articles on the Asian and Latin-American countries. In the article on the British position, the editor explains the difficulty of defining the public corporation, but says it may be treated as a functional organisation created for a definite purpose with certain universal legal characteristics applicable to all its forms, of which in Britain there are three, the distinctions between which are or may be of some importance in a number of respects. The legal powers of these bodies are considered as well as the extent of judicial control, which, limited as it is, is not easy to define, and which the editor says has not been aided by the test of "reasonableness" sometimes applied by the courts. The more important means of control lie, in his view, in Ministers and Parliament, for though duties are laid upon these corporations it is not clear, as Professor Mitchell also observes in his book, how far there are correlative rights in the private individual and indeed most of the duties are not enforceable by the individual. An interesting discussion of the problems of denationalisation concludes a most valuable survey.

Part two is a functional study of a public corporation at work, namely the National Coal Board, under the title of "The Legal Relationships of a Nationalised Industry," by Mr. R. S. S. Allen, formerly legal adviser and solicitor to the Board in England, who makes it clear that the views expressed are his own and not necessarily those of the Board. The constitution, administration and working of the N.C.B., along with the whole range of its legal relationships, are fully

set out with the relative statutory references in a comprehensive and able essay, which has a most useful table of contents at its outset. Mr. Allen points out the difficulty created by the dual responsibilities of the Board's legal staff. He does not approve of the setting up of an administrative tribunal to determine issues between two nationalised industries or between one such industry and a Government Department, but were nationalisation to be extended and large numbers of small undertakings to be nationalised, he thinks there would be scope for an administrative tribunal, manned partly by lawyers, which in reaching a decision could quite properly seek advice from the Government in the interests of a national policy. And in such a tribunal, in contrast to private law disputes, "the new equity" could play a very valuable part.

The third section deals with the International Public Corporation, illustrated by the various international organisations, including the European Coal and Steel Community—"the most significant experiment hitherto in technical international co-operation." Professor Parry, who is the author of this article, finds conflicting reflections provoked by this survey, for despite the many bodies set up and the existence of co-operation there is to be found, probably due to current circumstances, a lack of originality or unity of conception and a too strong inclination to follow the analogy of the national corporation, and while he thinks the situation will improve, the science of international co-operation must in his view having regard to the absence of co-operation for long be imperfect. Professor Parry (as also Professor Friedmann in the next chapter) makes a number of important suggestions for their improvement, which deserve the attention of international lawyers and statesmen, but the difficulties of reform are only too apparent.

In a comparative analysis which forms part four of the volume, Professor Friedmann notes a number of general conclusions arising from the survey. He thinks that in Britain the type of public enterprise represented by the joint stock company controlled by public authority as seen in France and Germany has been rightly rejected. He compares the characteristic features of the British public corporation with those of the corresponding bodies elsewhere. In dealing with their public and private law aspects—the most complex of the problems for the comparative lawyer—he points out the advantages and disadvantages of the Continental system of administrative law and courts in the legal treatment of a public corporation, which blends elements of different branches of the law. He prefers the attitude of the common law to that of the Continental countries, recognising as they do that the performance of industrial or commercial activities for the State does not prevent the activity from being of a governmental character. The whole trouble, however, lies in trying to get these corporations blending as they do attributes of private and public law into existing conceptions and categories, instead of recognising that something new has arisen and of adapting legal categories and ideas to the needs of changed modern times, for the wide range of a modern State's functions has destroyed the old categories and distinctions. In his view the public corporation should in respect of legal liability be put on the footing of a private corporate body, and at the same time the privileges and

immunities of the Crown in Britain should be reduced. As judicial control both by civil and by administrative courts is so limited he suggests the corporations should be more explicitly and unambiguously liable for their ordinary legal transactions than they are at present. Finally, he turns to some general conclusions and notes certain common features of the public corporation in the different countries. The most important problem, largely political, he finds is the right balance between managerial autonomy and political responsibility, and he suggests the steps that should be taken in that direction. The question of parliamentary control is indeed, as he says, an exceedingly difficult one as it goes to the root of modern democracy, and its satisfactory solution is of urgent importance. Both common law and Continental countries are fettered by past theories, but the combination of public law control and private law personality is absolutely essential for these new public corporations if they are to fulfil their true functions and serve their real purposes.

The cardinal problem of public law, said Professor Friedmann in one of his many writings, is how to preserve the legal security of the individual in a society in which more and more legal relations pass from the private to the public sphere, without hampering the needs of the administration in the social welfare State. And it is upon this problem—the maintenance of a reasonable balance between the public interest, the needs of the administration or the public service on the one hand and the legal security of the individual and the protection of his rights on the other—in relation to contracts between public authorities and the individual, in other words, the conflict between the sanctity of contract and the wide powers of the State acting in the public interest in regulating the affairs of the nation, that Professor Mitchell has written a most valuable and readable book. The subject is one of prime legal and general importance in view of the growth in the number of public authorities, of State and public authority activities and of the increase in economic regulation by the State. The object of the book, though it is a comparative study, is the practical and domestic one of trying to find out what future developments are likely to be in Britain and to suggest what line these should take. The principles of the English and Scottish cases are examined in the light of a survey of the principles and rules adopted in the Commonwealth and the U.S.A. where the common law applies and in France where rules of administrative law operate. Professor Mitchell then proceeds to make a number of suggestions which merit close and urgent attention for amendments to English and Scottish law to secure that the individual's rights are more properly protected than they are at present, without at the same time weakening the essential powers of public authorities. The main justification for his work Professor Mitchell finds in the need for ascertaining the operative principles, which are by no means clear on the authorities, though practice—the forms of such contracts—may be settled or standardised.

“The fundamental principle” says Professor Mitchell, in Part I. “is that the state or probably any public authority cannot be prevented by its contracts from performing functions essential to its existence and for which it was created. Its powers for these purposes may override its contractual obligations.” And this rule—giving a public authority

a special or privileged position, in that a contract to which it is a party will not be enforced (note the word "enforced") where some essential governmental purpose or activity—that is, he says, some matter fundamental to the maintenance and proper government of the community—would be rendered impossible or seriously hindered—though involving an inroad on the sanctity of contract, is no more than an application of an already existing principle, for the rule of the sanctity of contract is, as the reports adequately show, not absolute and unlimited. This principle of essential government purposes, which he finds supported in theory, history and authority, produces a number of consequences which help to simplify and clarify the position. For instance, the basis of it being the purposes for which the body exists and which it is performing, it can be readily and appropriately applied to subordinate bodies such as local authorities, nationalised industries or public corporations. It may be noted that Professor Friedmann in *The Public Corporation* says that these corporations have no special privileges except that like large private bodies they can lay down standard conditions which the private individual must accept.

Turning, in Part II, to the contracts of public authorities in England, Professor Mitchell after an exhaustive examination of the authorities finds this basic principle of public policy underlying the rule laid down in *The Amphitrite v. The King* [1921] 3 K.B. 500 that the Crown cannot hamper its freedom of executive action in regard to the welfare of the State, the rule that the Crown can dismiss its servants at pleasure, upon which Rowlatt J. based the *Amphitrite*, and the rule that a body having discretionary powers cannot fetter itself by contract from exercising them. The difficulty that has hitherto arisen has been due to the uncertainty and sometimes too great breadth in the statement of the doctrines, while not only has the Crown apparently been reluctant in practice to make use of *The Amphitrite* but the importance of such contracts has only recently come to the fore with the modern development of society. Within the narrow limits of the general principle the cases in relation to Crown servants and *The Amphitrite* (see per Lord Mackay in *Cameron v. Lord Advocate*, 1952 S.C. 165) become acceptable and the observations on that case of Denning J. in *Robertson v. Minister of Pensions* [1949] 1 K.B. 227 must, says Professor Mitchell, be rejected as unsatisfactory. And the rule in regard to dismissal of Crown servants being based on public policy can be applied to any branch of public service, including, he thinks, at least the members and directing staffs of public corporations, at the same time enabling temporary staff to be treated separately as not affected by these considerations. Again, the rule in regard to freedom of discretion is and must be limited to contracts which conflict seriously with the essential public functions of the authority, as illustrated in the latest case of *Wm. Cory & Son v. City of London* [1951] 2 K.B. 476; 1 K.B. 8, where the corporation in making the by-law was performing an essential public function. The distinction suggested in that case and by other authorities between corporations for the public good and those trading for profit Professor Mitchell thinks unworkable in practice: many bodies combine both these features.

Professor Mitchell also examines other peculiarities in the case of such contracts, such as the supposed rule that the Crown cannot

bind itself in contract for liability for payment without parliamentary approval, which he finds unsupported by authority (*cf.* Gloag on *Contract*, 2nd ed., 159) and the question of representations of authority by public bodies and their servants.

The American rules and cases are next examined and the history of the attitude of the courts, State and Federal, traced. In America the problem is emphasised by the strong constitutional safeguards for the individual, but despite these the private individual's contractual rights may have as in Britain to yield to the performance of necessary or essential government purposes or functions though, as *e.g.*, in *Perry v. U.S.* in 1935, there has not always been consistency in the recognition of the practical necessity of government. There is probably, Professor Mitchell thinks, a similarity between our general theory and that of the eminent domain in America. In Chapter IV Professor Mitchell looks at the situation in France where the separate administrative courts have, he says, held the scales better between the two parties. Though there are in France these special courts and other factors, yet he finds the solutions reached in the cases, which have marked similarities to those in the common law countries, not so affected by the peculiarities of the French system as to be irrelevant to the common law lawyer. The feature of the French system is the greater recognition of the private individual's right by a readiness to award him compensation or indemnity where he suffers loss, though the right to compensation is naturally not a wide or general one but has some important limits. Special rules of public law are applied to public authorities, and they show that if their contracts are treated as in a special class the necessary rules can be developed more easily and by making fundamental changes in the ordinary rules of contract. The public authority contract in France, governed as it is by the fact that on the one hand it is made in the public interest and on the other hand that it is subject to the principle of good faith towards the individual, is treated as fixing an equation between the parties and, provided that is not affected, adjustments and variations as necessity requires can be readily made. And yet the inequality of the parties is recognised in the special protection and consideration given to the individual. By that special public law treatment of these contracts, all the difficulties and disadvantages which affect the common law countries in their private law treatment are avoided.

Finally in Chapter V Professor Mitchell reviews the situation in the light of the survey and suggests some important amendments in English law. In all three systems he finds the administration given special privileges including the power of overriding in the public interest its contractual obligations in order to fulfil effectively its essential functions. This, he considers, is the underlying basis of the authorities in all three systems. Many actual and possible difficulties are thereby solved, and the test becomes whether the authority is one created in the public interest and whether it is performing public services. This is the justification, and at the same time the limit, of the power. And it is the only possible workable test. There, says Professor Mitchell, it is clear that special administrative contracts must have a place, and his survey shows the tests for determining such and some of their incidents. If they were recognised as different and special by the

common law countries (and it is because they are not so treated there that the individual's rights are not protected), new privileges could be given to the individual. While a movement towards consideration of his rights is seen in *Wm. Cory & Son* by the use of the doctrine of frustration, the development should be as in the doctrine of *imprevision* in France not by termination of the contract but towards continuation of the contract under substantial variation of it.

The overriding of contracts may of course involve much hardship to the private individual. It does not prevent compensation being given to him. The contract is not treated as invalid but as only subject to be overridden—a legally recognized interference. Yet in the United Kingdom the point is virtually ignored, though there is ample precedent in compulsory purchase, requisitioning and such cases as *Southern Foundries v. Shirlaw* [1940] A.C. 701. In Professor Mitchell's view compensation should be due and awarded. This need not equate damages for breach, and hence "compensation" rather than "damages" is the more suitable word. It should be, he thinks, limited to actual loss, and he makes some valuable suggestions for limiting the right where the interference arises from general legislation or by-laws.

The only radical changes in our law which he proposes and which have much to commend them are the recognition of the special position of governmental agencies and the admission of the possibility of compensation. These changes should come he feels rather through the Judicature than Parliament, for the basis for them is to be found in the decided cases and they should be gradual. We must, he holds, in this country no longer look at public law questions merely in relation to administrative adjudication and legislation: if the necessary balancing of interests is to be preserved or achieved, we must develop a special body of public law on the lines he has indicated. And if we look at the French system we can get much helpful guidance in developing and securing the rights of authority staffs, often recognised here in practice but not in theory, and of third parties, while the rules developed in America and France can aid us in regard to representations of authority, the individual's rights in this latter connection being protected by the courts—as in *Howell v. Falmouth Boat Construction Co.* [1951] A.C. 837. On all these topics Professor Mitchell has much valuable guidance to offer, as also upon the functions of the courts, whose jurisdictions he considers must be limited to control of the authority's motives and to the granting of compensation alone, and should not extend to annulment of the contract.

The Public Corporation has a good Index but might have had a fuller Table of Contents. Professor Mitchell's book, some parts of which have already appeared in *The Juridical Review* and the *Modern Law Review*, has not only a useful Table of Contents but also in addition to a very good Index, valuable Tables of Cases in Britain, America and France and of the English Statutes and a helpful list of abbreviations used for some series of reports, and in an Appendix Extracts from the General Government Contracts for Building and Civil Engineering Works.

There are no references to Scots law in Professor Friedmann's work and one may regret the absence of reference in a comparative law

work, especially to the corresponding Scots Statutes, Scots terminology and such things as Scottish remedies. As regards "*The Contracts of Public Authorities*" there are of course few Scottish authorities, but the Scots lawyer, though he will not find a reference to Gloag on *Contract*, will find references to the *regalia majora* and *minora* as illustrating the different treatment of two similar institutions due to essential government purposes, to *Mulvenna v. The Admiralty*, 1926 S.C. 842, where the idea of public interest was "carried to absurd lengths," to *Cameron v. Lord Advocate*, 1952 S.C. 165, *Ayr Harbour Board Trs. v. Oswald* (1883) 8 App.Cas. 623, *Paterson v. Provost of St. Andrews* (1881) 6 App.Cas. 833 and *Riach v. Lord Advocate*, 1932 S.C. 138, which, says Professor Mitchell, was, though not so decided, arguable as a case of a fetter on the discretion of a public department. It should be noted that when he uses the word "England" Professor Mitchell is frequently referring to the United Kingdom and the Commonwealth. As one may assume that the authority of the English cases on these matters will be recognised in Scotland, the fact that most of the authorities cited in the United Kingdom are English does not detract from the value of the book to the Scots lawyer.

G. CAMPBELL H. PATON.

The Principles of Modern Company Law. By L. C. B. Gower, LL.M. (Lond.). Solicitor of the Supreme Court; Sir Ernest Cassel Professor of Commercial Law in the University of London. 1954. London: Stevens & Sons, Ltd. Price £2 5s. net.

This is an unusual and interesting book. It is unusual because the learned author has taken advantage of the unique consortium in London of the study and of the practice of company law in its business, financial, economic, and in some measure political backgrounds; and has not hesitated to supplement his own wide knowledge from the practical experience of others in special directions; of which he makes due and specific acknowledgment. Its special interest lies in that it combines and relates history, law and critical commentary. The literature of the history—to the plain company lawyer surprisingly wealthy literature—and of commentary on the adaptation of the legislation at its successive developments is introduced to the reader not only in the text but also in footnotes. For this every company lawyer who feels or seeks to feel the undoubted fascination of the subject must be grateful. So also the academic teacher, whether of law or accountancy, seeking to breathe life into his exposition of the law and a larger perspective. Even the layman should find illumination in this book. To the company lawyer already versed in the law the most valuable chapters from the point of view of discussion of principles and critical commentary on the law as it stands are thought to be the chapters in Part Two on "The Consequences of Incorporation," in particular that on the doctrine of *Ultra Vires*, showing the loosening of the bonds of the doctrine by the legislature in response to business needs; on what this author calls "Lifting the Veil," being the compulsions whereby the courts have been driven to break away from the trammels of *Salomon v. Salomon*, as in matters of taxation—and in

that regard there is a concise summary on incorporation as a means of avoiding taxation and in this connection the "lifting" measures adopted by the legislature, Mr. Justice Harman's "dark legislative jungle"; and on the raising and more especially the maintenance of capital by the limited company. In relation to raising capital and capital structure the merits respectively of the debenture, the preference and the ordinary share capital and their mutual equities are diagnosed, and show, the inference seems, the inherent flexibility of the limited company and its adaptability to the general financial environment for the time being. A related topic, very fully considered, is Investor and Creditor Protection, and the author discovers a philosophy of disclosure in the British law and practice in contrast to one of supervision in the United States. It is in Britain a case of regulated disclosure effectively supplemented by the organs of the Stock Exchange and the financial Press. The detailed requirements of the prospectus in flotations is perhaps the chief legislative manifestation of the British approach, and the interaction of business practice and legislative developments in this regard is interestingly brought out. Most recent are the added requirements in company accounts, and the author well analyses the deep-seated complexities of company accounting as a means of informing shareholders and the public of the financial position of the company. It would seem doubtful whether the more recent elaboration has done more to enlighten or to confuse the interested member or prospective creditor. Fundamental in this difficulty are the rules as to maintenance of capital, and the merits of the no par value share in this perspective of disclosure of the true position of the company are canvassed. This is of course not the only context in which the merits of no par value should be examined. Among the more general subjects considered, and very topically, is the juridical position of the company in relation to crime and civil liability for tort. In relation to the company the organic theory is the concept seeming to hold the field, namely, that the officials of the company are the company as being its organs, and not merely its limbs; a conception which can be traced to Lord Parker in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., Ltd.* in 1916.

Of the less general problems of company law in relation to its modification many are examined, and the reader can rely on an always balanced statement of the pros and cons, followed by a clear summing-up. These include the floating charge, which is foreign to the law of Scotland. Scottish lawyers will note with approval the author's awareness of contrasting situations in Scotland, of which the floating charge is one, and will welcome the specially clear exposition of the law of England as to charges in company law, a subject which rather repels the Scottish lawyer by its intricacy and technicality.

In sum, be it said, in its fresh approach and instructive discursiveness, the book is valuable as, it is thought, the first of its kind in relation to English company law. One recalls the enlightenment afforded by the reading some twenty years ago of Dr. Wegenast's *Canadian Companies*, a book of commentary perhaps more completely systematic than the present essay is intended to be. Lest all seems to be praise, the author surely errs when he says (p. 520, note 6) that "capital (a notional liability) cannot be lost; it can only be

unrepresented by available assets." The latter phrase is, however, not merely exegetical of the former, but they are alternatives (*In re Hoare & Co., Ltd. and reduced* [1904] 2 Ch. 208) and capital may be unrepresented by available assets though not lost at all—but this may be more apparent to the lawyer than to the accountant. The fluent and vigorous writing which characterises the text gives added pleasure to the reading of this book, as also does the excellence of the print and the production.

J. A. LILLIE.

Tax Planning (with Precedents). By D. C. Potter and H. H. Monroe, Barristers-at-Law, assisted by H. G. S. Plunkett, Barrister-at-Law, formerly one of H.M. Inspectors of Taxes. 1954. London: Sweet and Maxwell, Ltd. Price £2 5s. net.

It may be assumed that the Scots lawyer views the imposts of the Inland Revenue with at least as much distaste as his English confrère. Significantly this volume is prefaced by the dictum of an eminent Scottish judge. "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. . . . The taxpayer is entitled to be astute to prevent, as far as honestly he can, the depletion of his means by the Inland Revenue"—*per* Lord President Clyde in *Ayrshire Pullman Motor Services and D. M. Ritchie v. I. R.*, (1929) 14 T.C. 754. A limit to the too light-hearted application of this principle was indicated by Lord Simon in *Latilla v. I. R.* [1943] A.C. 377, where his Lordship observed that the disposal of income in such a way as to enjoy the benefits of residence in Britain without sharing in the appropriate burden of British taxation was not to be regarded as a commendable exercise of ingenuity. But avoidance is not the same thing as evasion. The dictum of Lord Halsbury, adopted by Lord Hanworth in *Bullivant v. Att.-Gen. for Victoria* [1901] A.C. 196, still stands—"It must be shewn that the tax is exigible in the circumstances of the case; and if it is not exigible, it is not a case of evasion at all."

The volume under review is modestly introduced as having a twofold purpose: first, to provide the legal draftsman with a supplementary book of precedents, for use where considerations of tax or duty arise; and secondly to help those called upon to deal with the management or disposition of property liable to heavy burdens of tax or duty to understand the principles of liability, and to specify the type of disposition likely to prove most advantageous. The book comprises a number of chapters, each dealing with a type of transaction or disposition in which tax or duty considerations may be material: and in each chapter, after an exposition of the relevant statutory provisions and judicial decisions, the learned authors offer a selection of recommended styles.

This is no Tax Dodgers' Vade-mecum. That is not its purpose. Obviously the publication of a volume of tax-evasion dodges would

merely invite amendment of the fiscal laws. What the present volume does is to show how, from the point of view of incidence of tax or duty, there is often a right and a wrong way of doing things. There are certain forms of transaction which attract an impost, whereas substantially the same end may be achieved, by other means, tax-free. There are certain transactions which, outside certain limits, are penalised by taxation, whereas within the appropriate limits they are immune. Understanding of these forms and limits, and the adoption of the most economical method permissible, need not, it is thought, invoke legislative retribution. The aim of this volume is to explain these forms and limits, and to provide suitable styles.

The precedents provided number forty. They are cast in the English form, but their adaptation to Scottish style should not be difficult once the underlying principles are understood. No doubt the Scots practitioner will have to be on his guard against the occasional difference which crops up—even in Revenue matters—between English and Scots practice. But such differences are comparatively rare: and the Scots practitioner should find this volume of great practical use.

H. A. SHEWAN.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

The Law of Nations. Fifth Edition. By J. L. Brierly. 1955. Oxford: The Clarendon Press. Price 15s. net (in U.K. only).

Byles on Bills of Exchange. Twenty-first Edition. By Maurice Megrah, Barrister-at-Law. 1955. London: Sweet & Maxwell Ltd. Price £3 3s. net.

The Scottish Bankruptcy Manual. Fifth Edition. By John B. Wardhaugh, C.A. With separate Sequestration Time Chart. 1955. Edinburgh: W. Green & Son. Ltd. Price £1 15s. net.

Apokrimata Decisions of Septimus Severus on Legal Matters. Text, Translation and Historical Analysis by W. L. Westermann. Legal Commentary by A. R. Schiller. 1954. New York: Columbia University Press. (London: Geoffrey Cumberlege) Price £3 net.

Profit-Sharing in Practice and Law. By John C. Harper, LL.B. (Lond.) 1955. London: Sweet & Maxwell Ltd. Price £1 18s. 6d. net.

Laws Concerning Nationality. United Nations Legislative Series. 1954. New York: United Nations. Price £1 10s. net.

Studying Law. Edited by A. T. Vanderbilt, Chief Justice, Supreme Court of New Jersey. 1955. New York: New York University Press. Price \$6.00

Every Man's Own Lawyer. Sixty-eighth Edition, Thoroughly Revised and Enlarged. By a Barrister. 1955. London: The Technical Press Ltd. Price £1 10s. net.

Archbold's Criminal Pleading, Evidence and Practice. Fifth Cumulative Supplement to Thirty-third Edition. Edited by T. R. F. Butler, Barrister-at-Law and M. Garsia, Barrister-at-Law. 1955. London: Sweet & Maxwell Ltd.

Private International Law. By J. A. C. Thomas, M.A., LL.B. 1955. London: Hutchinson's University Library. Price 8s. 6d. net.

The Law of Civil Injuries. By Hamish R. Gray, LL.M. 1955. London: Hutchinson's University Library. Price 8s. 6d. net.

Professional Negligence. By J. P. Eddy, Q.C. With a foreword by The Rt. Hon. Sir Alfred Denning. 1955. London: Stevens & Sons Ltd. Price 18s. 6d. net.

The Rent Acts. By R. E. Megarry, M.A., LL.B. Eighth edition by Ashley Bramall, B.A. and P. V. Baker, B.C.L., M.A. 1955. London: Stevens & Sons Ltd. Price £2 15s. net.

Blundell's Rent Restrictions Cases, Annotated. Third Edition by L. A. Blundell, LL.M., and V. G. Wellings, M.A.(Oxon.). With Supplement. 1955. London: Sweet & Maxwell Ltd. Price £2 10s. net.



Photo by]

[Drummond Young, Edinburgh

The Right Honourable LORD COOPER OF CULROSS,
P.C., O.B.E., LL.D., Docteur *Honoris Causa* (Université de Paris)

JURIDICAL REVIEW

THE CONTRIBUTION OF LORD COOPER OF CULROSS TO SCOTTISH LAW ¹

I SHOULD not do justice to the memory of the man who was probably the outstanding Scottish judge of our time if I were to speak tonight in the language of eulogy. The temptation to do so—which is strong when there is the sense of recent loss—must be resisted. Lord Cooper's personal qualities have been brilliantly and sympathetically recorded in obituary notices by men who had been intimate friends of a lifetime; and for such as myself—a junior disciple—to dwell upon these qualities would be almost an impertinence. My aim is to assess the contribution made by Lord Cooper of Culross to the Law of Scotland—not only in discharge of the highest judicial offices of the country as Lord Justice-General of Scotland, as Lord Justice-Clerk and as Lord President of the Court of Session—but also in the field of Scottish legal scholarship. Whether my evaluation is justified depends not only on the past but on the future. On the morrow of Corunna how would a soldier have assessed the achievement of John Moore? A Napier or Hardinge would not have judged it merely by the gains and losses of a Peninsular campaign—but according as to whether Moore's enlightened and humanely efficient training of the Light Division at Shorncliffe would establish a viable tradition. Posterity will judge the achievement of Lord Cooper, not only by his work for the law of Scotland, but by the flowering or withering of that law to which he devoted his life. We, and especially those of us who are

¹ This public Memorial lecture, at which Principal Sir Thomas Taylor, C.B.E., Q.C., D.D., LL.D. presided, was delivered in the University of Aberdeen at the opening of the Winter Session, 1955.

lawyers, cannot take too much for granted in this respect ; and the future is largely in our own hands.

Thomas Mackay Cooper was born in 1892. Outstanding both at school and at University, he very quickly made his mark on admission to the Faculty of Advocates, and took silk in 1927. His sure mastery of law and of a lucid and logical forensic style ensured rapid and deserved success at the Bar. In 1935 he became successively Solicitor-General for Scotland and Lord Advocate, proving in these offices his great talent for administration. In the same year he was sworn of the Privy Council. On the death of Lord Justice-Clerk Aitchison in 1941, Lord Cooper was appointed to succeed him and presided in the Second Division until 1946, when he followed Lord Normand as Lord Justice-General of Scotland and Lord President of the Court of Session on the latter's appointment as Lord of Appeal in Ordinary. In June 1954 Lord Cooper was created Baron Cooper of Culross, of Dunnet in the County of Caithness, but, unlike Lord Dunedin earlier in the century, he was not to enjoy the opportunity of sitting judicially from time to time in the House of Lords while retaining supreme judicial office in Scotland. Before the sittings of the court resumed last year, he was suddenly struck down by a serious illness, from which he never recovered. In December he resigned his judicial offices, and on July 15 this year he died.

I need not greatly elaborate this brief factual statement except to note that Lord Cooper's talents were employed extensively outside the normal judicial field. His capacity for hard work was prodigious. To him fell, for example, the preparatory work for the hydro-electric development of the North of Scotland ; he sat on the Committee of Inquiry which sought to resolve the St. Andrews University dispute ; he was most actively concerned with the administration of the National Library and of the National Galleries of Scotland. Between 1946 and 1949 he was President of the Scottish History Society ; as Chairman of Council of the Stair Society he was tireless and undaunted in his efforts on behalf of Scottish legal history.

Baldly stated, these facts might imply no more than the *cursus honorum* of a very able Scottish lawyer. My submission, however, claims much more. I believe that the state of Scottish law and of Scottish affairs generally when Lord Cooper assumed judicial office was such that he alone had the necessary combination of qualities to check certain trends and to reorientate the course of development. He was only granted some thirteen years on the Bench, and though he worked with almost superhuman energy and application we cannot say for certain that this time was sufficient for the task he attempted. Lord Cooper believed that the law of Scotland—especially private law and criminal law—was a “typical product of the Scottish ethos.” He considered that this law (though needing reform in certain respects) was an important part of our national heritage, a safeguard of our liberties and in itself a guarantee of our nationhood. He also believed—and with good reason—that on its merits Scottish law should be preferred on impartial comparative evaluation to the law of England, which was increasingly encroaching on the Scottish system. Therefore he was concerned above all to preserve the Scottish legal tradition. Few men can have had a deeper understanding of that tradition, and the published results of his researches into medieval Scottish law—especially that of the thirteenth century—are so far our surest guide in that field.² By contrast with the medievalist—or, should I more truly say in supplement of the medievalist—we find in Lord Cooper the mind of the reformer or, as he himself put it, of the iconoclast. He was not addicted to ancestor worship for its own sake, nor to favouring a legal doctrine merely because at some phase in Scotland’s legal development it had gained recognition. There was much of the spirit of Bentham in the late Lord President. He had the intellectual honesty for example, to admire what is good in Stair, the greatest of our

² See, e.g., Stair Soc., vols. 1, 10 and 11; “Select Scottish Cases of the Thirteenth Century” (1944); “Supra Crepidam” (1951); “The Dark Age of Scottish Legal History” (1952); and numerous articles in the *Juridical Review* and *Scottish Historical Review*. It is earnestly hoped by the writer that a collection of Lord Cooper’s writings will be published in due course.

institutional writers, but to deny him that semisuperstitious reverence which—associated with incantations to institutional writers generally and to Roman law—one finds most frequently among those Scottish lawyers who know least about Roman law or of the contents of the folio treasuries of our common law. Roman law Cooper regarded as having been a valuable formative influence in Scottish law. In modern times, as he observed,³ “borrowing still goes on, but under the impact of the new interest in comparative jurisprudence the lawyer in search of new ideas has now the civilised world at his disposal and is not confined to Justinian and Gregory IX.” Strongly opposed to uncritical Anglicisation of Scottish law, Lord Cooper fully recognised the contributions made in recent years by Anglo-American legal scholarship in refining legal principles.⁴ In appropriate cases he gladly accepted the lead of English writers and judges, but he was sensitive⁵—possibly, though understandably, hypersensitive—to the danger of indiscriminate borrowing. If I may peril myself on a medical analogy, if there is transfusion from an unsuitable blood group or with infected blood, one may kill the patient. Thorough testing by experts is a necessary preliminary. From preference, however, Lord Cooper was concerned to encourage the traditional intellectual contacts of Scottish lawyers with the legal thought of the Continent. It is significant that Lord Cooper was the first Scottish judge since the sixteenth century to receive a Doctorate from the University of Paris. In his relations with English lawyers, though he valued his election as Honorary Bencher of the Middle Temple, he was probably more at home with those from the Law Schools of Oxford, Cambridge and London than with the Chancery or

³ (1950) 63 Harv.L.R. 469.

⁴ e.g., *B.M.T. v. Gray*, 1951 S.C. 586; 1951 S.L.T. 247 (restraint of trade); *Watt v. Jamieson*, 1954 S.C. 56; 1954 S.L.T. 56 (nuisance).

⁵ e.g., *Macdonald v. North of Scotland Bank*, 1942 S.C. 369; 1942 S.L.T. 196 (prescription of bank account); *McLaughlan v. Craig*, 1948 S.C. 599; 1948 S.L.T. 483 (*Rylands v. Fletcher* liability); *Winks Exors v. Tallent*, 1947 S.C. 470; 1947 S.L.T. 316, also *Salvesen's Trs. v. Wye*, 1954 S.C. 440; 1954 S.L.T. 299 (charitable trusts); *Famer v. Mill*, 1948 J.C. 4; 1948 S.L.T. 133 (interpretation of Vagrancy Act).

Common Law practitioner in whom he sometimes suspected a conservative complacency.⁶

Concerned not only intellectually but emotionally to preserve the Scottish legal tradition against encroachment, yet zealous for the reform—using modern comparative methods—of all that was out of keeping with current social developments, Lord Cooper was called to high judicial office at a critical time. The field of human activity controlled by the principles of Scottish law had greatly diminished since the nineteenth century when Inglis, for example, had undertaken a task comparable to Cooper's. Further, the defences were in the mid-twentieth century in an indifferent state of repair. United Kingdom statute law, including much emergency legislation, had in many branches of the law replaced well-established principles. The English doctrine of absolute sovereignty of the King in Parliament had not been seriously challenged in a Scottish court. Administrative law and tribunals had in many instances ousted the jurisdiction of the Supreme Courts; nationalisation and voluntary amalgamation of industrial and mercantile enterprises had led to increasing exclusion of Scottish law from application even in Scottish affairs—through arbitration clauses in contracts and so forth. The Scotsman under arms—volunteer or conscript—was by a statutory provision of general reference subjected not just to a British military code but generally to an alien system of criminal law. In the administration of the principles of Scottish common law by some judges in the Scottish courts and the House of Lords, there had long been a tendency to assimilate Scottish to English law through citation of English precedents and by the facile assumption—made frequently without argument by qualified experts on the point, and sometimes without full comprehension—that the principles of Scottish and English law on the matter *sub judice* were identical.⁷ Now,

⁶ "Scottish Legal Tradition" (1949) at p. 30.

⁷ Thus it was assumed without argument in *Donoghue v. Stevenson*, 1932 S.C.(H.L.) 31; 1932 S.L.T. 317, that the Scottish principle of *culpa* and the English tort of negligence were identical—which is demonstrably inaccurate.

of course, these various factors had operated long before the mid-twentieth century and had exercised the attention of Scottish lawyers since the Union, but they had become increasingly prominent during the twentieth century.

The defences against such encroachment were not well manned. In particular the Law Schools of the Universities—which in other countries may be relied on for the maintenance of a critical censorship of the law commanding the respect of the profession; for the production of treatises and articles of authority; and for the enthusing of new generations of lawyers—in Scotland did not without exception rise to the occasion. Legal scholarship relied in Scotland on the work of a very few enthusiastic or disillusioned men. More and more the tendency increased to live exclusively on the capital of the past—which may lead to parochialism—or to borrow from the nearest neighbour without calculating the consequences. These consequences are bankruptcy and absorption.

Such then is the background of Lord Cooper's contribution to Scottish law—the background to his preservation of a valued heritage and to his reform and advocacy of further reforms where he found the system defective. To these tasks he brought a sense of mission; a clearness of thought and lucidity of style—which make his printed judgments a joy to read⁸—and intense application to work. It is common knowledge that he preferred to preside in the courts of Scotland rather than—like a number of his predecessors as Lord Advocate or Lord President—to accept appointment to the House of Lords as one of the Lords of Appeal in Ordinary. This preference distinguishes him from such Scottish judges as Lord Robertson, and suggests the comparison of Lord Cooper's contribution with that of

⁸ Particular reference may be made to his opinions in complex cases of property trust and succession, e.g., *Cochrane's Ex. v. Cochrane*, 1947 S.C. 134; 1947 S.L.T. 69; *Tennent's J. F. v. Tennent*, 1954 S.C. 215; 1954 S.L.T. 161; *Petrie's Trs. v. Mander's Tr.* 1954 S.C. 430; 1954 S.L.T. (Notes) 72; *Sturgis's Tr. v. Sturgis*, 1951 S.C. 637; 1952 S.L.T. 37; *Ballantyne's Trs. v. Ballantyne*, 1952 S.C. 458; 1952 S.L.T. 425; *Magistrates of Banff v. Ruthin Castle*, 1944 S.C. 36; 1944 S.L.T. 373; *Elliot's Ex. v. Elliot*, 1953 S.C. 43; 1953 S.L.T. 91.

Lord President Inglis. Like Inglis in the Bute Guardianship case,⁹ it fell to him to defend the jurisdiction of the Court of Session against the House of Lords and to emphasise the Scottish view that the Treaty of Union is still a valid constitutional document. (In passing, one may question whether Scotland can afford to spare two of her ablest judges for permanent duty in the House of Lords—which hears annually only a trifling number of Scottish civil appeals and, of course, no Scottish appeals in criminal matters.) Again like Inglis, Cooper presided first in the Second Division before his promotion to the Lord President's Chair, and thus knew intimately the judicial psychology of his colleagues in both Divisions.

The technique of a great judge cannot be taken to pieces like a machine; yet, so to speak, checks and balances also play their part in the judicial process. Though it may be clear that justice and modern conditions would suggest one solution, even a court which is not enslaved to precedent may be compelled with reluctance to decide according to the unambiguous terms of a statute or according to some established rule of professional practice.¹⁰ If the decision must be shared by a bench of judges, then the interpretation of the law by each must lead to adjustments in the decision of all. Thus it is that an analysis of Lord Cooper's decisions produces, on the one hand, instances of judicial reorientation of law, and, on the other, instances of reluctant acquiescence in obsolete or obsolescent doctrines. Moreover, the ablest of judges is not infallible, and Lord Cooper was no exception.¹¹ Being a bachelor, for example, he possibly set the standards of married life rather higher than the average man who has actual experience of it would consider reasonable.¹² In exercising criminal jurisdiction

⁹ (1861) 4 Macq. at pp. 76-77; see also *Orr Ewing v. Orr Ewing's Trs.* (1884) 11 R. 600.

¹⁰ *e.g.*, *Borland v. Borland*, 1947 S.C. 432; 1947 S.L.T. 242.

¹¹ See, *Ross's J. F. v. Martin*, 1954 S.C. 18; 1954 S.L.T. 49; 1955 S.L.T. 117 (an understandable but fallacious endeavour to give effect to the supposed meaning of the testatrix rather than to the wording of the will).

¹² *Jamieson v. Jamieson*, 1951 S.C. 286; 1951 S.L.T. 174; rev. 1952 S.C.(H.L.) 44; 1952 S.L.T. 257; *Wallace v. Wallace*, 1952 S.C. 197; 1952 S.L.T. 165. On the

his greatest difficulties probably arose after a verdict of "guilty" had been recorded in certain types of case and in *McCudden*¹³ it may be thought that he overstrained the law regarding corroboration by evidence of similar acts.

I propose then to deal with Lord Cooper's influence on various aspects of the law—developing, preserving, defending, and indeed counter-attacking, as he considered the case required. His judicial opinions are only one of the sources on which I have drawn.

Criminal Law

It is obvious that Lord Cooper maintained a very close interest in Scottish criminal law even after he had demitted office as Lord Justice-Clerk and assumed that of Lord Justice-General. This chapter of Scottish law has been greatly developed during the last thirty years by decisions of individual judges and by appellate sessions of the High Court of Justiciary. No appeal lies in criminal matters to the House of Lords, and so the Scottish judges are masters in their own house—unless Parliament should intervene. That, I think, was the main reason why his Lordship opposed codification of Scottish criminal law while favouring in theory codification of Scottish private law—if carried out in Scotland by a competent Scottish body. Criminal law, he feared, might be codified on a United Kingdom basis to the serious prejudice of the more enlightened principles of Scottish law. In his evidence before the Royal Commission on Capital Punishment¹⁴—a masterly clarification of our law—the late Lord Justice-General stressed a number of these principles. The Scottish law of murder is in effect confined to cases of intentional killing; "constructive malice" is unknown; the anachronistic *McNaughton* rules regarding insanity do not bind a Scottish court; insanity is practically never in Scotland a contested issue because of the

other hand in *Riddell v. Riddell*, 1952 S.C. 475; 1953 S.L.T. 9, the late Lord President gave a masterly exposition of the law regarding collusion and lenocinium.

¹³ 1952 J.C. 86; 1952 S.L.T. 357.

¹⁴ Minute of Evidence 18—1950.

plea of diminished responsibility; the illogical verdict of "Guilty but insane" has no place north of Tweed; the scope of the death penalty is restricted within very narrow limits; pre-trial and re-trial publicity are avoided. It is ironical that the conflicting views of English law, which are themselves condemned by enlightened lawyers in the South, should have been perpetuated so far as soldiers and airmen are concerned, including Scottish soldiers and airmen, by the Army Act and Air Force Act of this year¹⁵ which had to be defended on these points in Parliament by the present Lord Advocate. His task was an unenviable one. Lord Cooper's apprehensions regarding the effect on Scotsmen of codification of criminal law in Britain were, it would appear, amply justified.

From the many leading contributions made by the late Lord Justice-General to Scottish criminal law, I can select only a few. Best known, I expect, in Aberdeen was the case of *Dewar*.¹⁶ It was urged for the defence in that case that the indictment for theft of numerous coffins and coffin lids, appropriated by the manager of the Aberdeen Crematorium after bodies had been committed for cremation, could be met by the defence that the accused believed that he was justified in so acting. He thought, it was said, that he could treat these coffins and lids (for which, of course, the executors had paid) as "scrap." The jury was left in no doubt by the judge's charge that—while error or mistake might in law be a good defence—such a defence as was advanced by Dewar could only avail if the belief could be proved to be reasonable—as to which the onus was virtually impossible to discharge in the circumstances.

In *Crawford*,¹⁷ the law regarding provocation and self-defence—which had been somewhat confused in the earlier case of *Hillan*,¹⁸ due to the fact that the background

¹⁵ *i.e.*, Army Act, 1955, 3 and 4 Eliz. 2, c. 18, esp. s. 70; Air Force Act, 1955, 3 and 4 Eliz. 2, c. 19.

¹⁶ 1945 J.C. 5; 1945 S.L.T. 114.

¹⁷ 1950 J.C. 67; 1950 S.L.T. 279.

¹⁸ 1937 J.C. 53; 1937 S.L.T. 396.

to such pleas is often similar—was clarified by a court presided over by Lord Cooper. Provocation, it was stressed, cannot exculpate but can only palliate crime—justifying, that is to say, a lesser punishment. Self-defence must exculpate completely or fail completely.

Giving the leading opinions in *Fox v. Patterson*,¹⁹ and *Brannan*,²⁰ Lord Cooper made clear the scope of the doctrine of “recent possession” which, when it applies, may throw on an accused found in suspicious circumstances “in possession” of recently stolen goods the onus of giving an explanation compatible with his innocence. This doctrine is of very considerable practical importance in the suppression of crime—and the solution reached by the court reconciles common sense with adequate safeguards for a person unjustifiably suspected. It is not necessary that the stolen goods should have been actually found by the police upon the person or under the immediate control of the suspect—provided, for example, it can be proved that he had parted with possession.

In *Galletly v. Laird*,²¹ his Lordship had to consider the vexed contemporary problem of obscene literature, and his views were later adopted by Lord Goddard in England. His concern was not primarily with the nature of the work attacked, but rather with the question whether it was being circulated among those likely to be corrupted. Works which were condemned by “the morose Puritan” might in law be unobjectionable so far as the educated reading public were concerned.

Two of Lord Cooper’s charges to juries in murder cases may be mentioned as models of clarity. Reading them, one is struck by his facility in presenting complex legal issues in exact and easily comprehended language. In *Braithwaite*,²² he was concerned with the defence of “diminished responsibility”—that is to say a defence falling short of a plea of

¹⁹ 1948 J.C. 104; 1948 S.L.T. 547.

²⁰ 1954 J.C. 87; 1954 S.L.T. 255.

²¹ 1953 J.C. 16; 1953 S.L.T. 67.

²² 1945 J.C. 55; 1945 S.L.T. 209.

insanity, which will justify a court in treating as a mitigating factor some lesser impairment of the mind or mental aberration. After his charge, stating the limits of the defence, the jury convicted of murder. *Rutherford*,²³ was indeed a unique case. The defence was that the deceased woman had "pestered" the panel (or accused) to strangle her; and that he had (according to his own story) to frighten her put a tie round her neck, pulled it, and had inadvertently throttled the deceased. Lord Justice-Clerk Cooper (as he then was) gave very clear directions on the limits of murder, culpable homicide, casual homicide and assault—ruling out assault and casual homicide from the jury's consideration. He further clarified the distinction made in criminal law between motive and intention. The jury convicted of culpable homicide.

Some of the most controversial criminal decisions of Lord Cooper—controversial because of major importance as the liberty of the citizen is involved—concern the admissibility of evidence elicited by police interrogation or during examination of police surgeons, or as a result of unauthorised search of premises. His Lordship had to reconcile two often conflicting interests: one, that the citizen should be protected from illegal or irregular invasion of his liberties by the authorities; and the other, that the interest of the State to secure evidence bearing upon the commission of crime should not be withheld merely on technical grounds. In seeking a just solution a number of interesting distinctions have been made by the High Court of Justiciary in recent years. So far as material evidence is concerned (*e.g.*, possession of salmon in the close season), even if the evidence has been obtained in circumstances of which the law disapproves, the court *may* in its discretion admit the evidence.²⁴ This discretion to admit is subject to the qualification that material evidence discovered as a result of improper interrogation and linked with it is not admissible;

²³ 1947 J.C. 1; 1947 S.L.T. 3.

²⁴ Compare *Lawrie v. Muir*, 1950 J.C. 19; 1950 S.L.T. 37; and *Fairley v. Fishmongers of London*, 1951 J.C. 14; 1951 S.L.T. 54.

and also to the qualification that, while the police refrain from arresting an individual (and the decision to arrest limits police powers of questioning) material evidence obtained from the accused person prior to arrest will not usually be admitted.²⁵ As the Lord Justice-General observed of such cases, "Unless the principles under which police investigations are carried out are adhered to with reasonable strictness, the anchor of the entire system for the protection of the public will very soon begin to drag." May I underline the increased sensitivity to protect a suspect when his actual person is immediately concerned. This is again apparent in the strict rules laid down by a court presided over by Lord Cooper regarding procedure as to medical examination and evidence elicited during medical examination of persons suspected of driving while under the influence of drink and drugs.²⁶ In his last year of judicial office the late Lord Justice-General convened a Full Bench to consider the admissibility of evidence elicited by police interrogation prior to arrest of a boy who was suspected as the likely perpetrator of a murder.²⁷ It was held—admittedly hampering the police in their investigation—that at the stage when suspicion has definitely focused on a particular individual, only a voluntary statement made without pressure or inducement is admissible—while after arrest the accused must not be questioned at all. Prior to arrest it would also seem that a citizen may decline either to answer questions or to accompany the police to the station "to assist them in their inquiries." It seems to me that Lord Cooper was not happy—as his earlier views in *Rigg*,²⁸ (another case of murder) seem to confirm—about the spontaneity of admissions made by persons in the hands of the police. Professor Dewar Gibb has with some justification criticised his attitude of "undue tenderness"²⁹ to accused persons as unreasonably hindering the investigation of

²⁵ *McGovern*, 1950 J.C. 33; 1950 S.L.T. 133.

²⁶ *Reid v. Nixon*, 1948 J.C. 68; 1948 S.L.T. 295.

²⁷ *Chalmers*, 1954 J.C. 66; 1954 S.L.T. 177.

²⁸ 1946 J.C. 1; 1946 S.L.T. 49.

²⁹ 66 J.R. 199.

crime. Lord Cooper's solution would probably have been to revive the older Scottish practice of preliminary judicial examination of suspects before an impartial judge—the sheriff—and this solution has much to commend it. Another good example of his concern for fairness to the suspect is apparent in his condemnation of pre-trial press comment on matters which might embarrass the defence by influencing the minds of those who were to serve on the jury. In *Macalister v. Associated Newspapers*,³⁰ which preceded the so-called Scottish Nationalist "Conspiracy Trial," he intervened to curb the pre-trial comment of a paper which had followed un-Scottish standards in such matters by publishing a series of articles calculated to create alarm and antagonism regarding the so-called S.R.A.

Civil Law

Scottish criminal law was, compared with civil law, late in maturing, and has not been so restricted by precedent as have many chapters of civil law. Let us observe how Lord Cooper dealt with a number of problems in the civil law where application of the established legal rule would not do justice in a particular case. Where the rule was clear and unambiguous and was relied on in professional practice, he felt unable to override law with equity even in "hard cases." Conveyancing is a formal and conservative branch of the law in any country—possibly particularly so in Scotland. Thus Lord Cooper insisted on exact fulfilment of the strict formalities of notarial execution of deeds—though he admitted that the result of insisting upon the strict letter of the law might be to frustrate what was the genuine expression of a testator's last wishes.³¹

On the other hand, where probative writing was required to complete a contract for the sale of a house and it was sought to take advantage of a technicality, his Lordship

³⁰ 1954 S.L.T. 14.

³¹ *Hynd's Tr. v. Hynd's Trs.*, 1954 S.C. 112; 1954 S.L.T. 113; *Finlay's Trs. v. Finlay*, 1948 S.C. 16; 1948 S.L.T. 182.

denounced the rule regarding the requirement of probative writing of both parties as "a fossil relic of feudalism, explicable, if confined within the field of strict conveyancing, but completely out of touch with realities when it intrudes into the field of mutual contract." The circumstances of the case made it possible on a rather strained construction for him to hold that the technical rule had in fact been satisfied.³²

The same attitude of respect for settled law and intolerance of anachronism can be found in the late Lord President's attitude to questions regarding the property of married women.³³ Formerly the law had tended to treat married women rather like wayward children where property was concerned—and elaborate trusts were contrived to put a woman's capital beyond her reach, restricting her to a liferent even if there were no children of the marriage and she was left a widow. With the ever-decreasing value of money, many childless ladies of middle age (and, I must add, their husbands) had occasion to deplore the caution of the bride's father in tying up her property on marriage some thirty years earlier. In *Beith's Trs. v. Beith*,³⁴ the First Division, led by Lord Cooper, considering the changes in the position of married women generally during the past seventy-five years, declined to follow a precedent laid down by seven judges in 1875. Applying in effect the maxim *cessante ratione legis cessat lex ipsa*, the First Division re-fashioned the law, and held that in a marriage where there could no longer be children the wife could call on the trustees of the marriage contract to pay over her capital. The conditions governing the liberation of the wife's capital from the fetters of a trust have been worked out in subsequent cases—in which the need to reorientate the law and also to respect such established doctrines as "alimentary" protection have been taken into account.³⁵ In *Preston v.*

³² *McGinn v. Shearer*, 1947 S.C. 334; 1947 S.L.T. 255.

³³ *Dempster's Trs. v. Dempster*, 1949 S.C. 92; 1949 S.L.T. 110.

³⁴ 1950 S.C. 66; 1950 S.L.T. 70.

³⁵ *Kennedy v. Kennedy's Trs.*, 1953 S.C. 60; 1953 S.L.T. 131; *Sturgis's Tr. v. Sturgis*, 1951 S.C. 637; 1951 S.L.T. 37.

Preston,³⁶ Lord Cooper clearly regarded as unsatisfactory the existing law restricting the wife's participation in the revenue of the household. Though acquiescing in this law in the case before him, he looked forward to the day when legislation or judicial decision in a more authoritative court would introduce a limited form of *communio bonorum*.

The one case in contract which I have time to mention,³⁷ I again select, not for what the court actually decided, but for Lord Cooper's suggested challenge to the tyranny of "contracts of adhesion." By this I mean that in many transactions today, notably contracts of carriage, the operator by printed conditions which are never the subject of negotiation purports to exclude his liability in contract or delict for any mishap to the person paying for the service. In *McKay v. Scottish Airways*,³⁸ Lord Cooper reserved his opinion on the point (which had not been argued) whether public policy might not be pleaded to restrict the sweeping exemptions from liability which are encountered in many leonine bargains through the operation of "ticket conditions."

Delict or reparation is another chapter of the law to which Lord Cooper has made an important contribution in somewhat difficult circumstances. The basic principle of the Scottish law of reparation is that liability depends upon fault or breach of duty by the defender. Liability for *culpa* or negligence may arise in very different circumstances, but this does not alter the basic principle.³⁹ Through decisions

³⁶ 1950 S.C. 253; 1950 S.L.T. 196.

³⁷ Among many other important decisions of Lord Cooper in the field of contract, the following may be particularly noted:—*Martin v. Scottish Transport and General Workers Union*, 1951 S.C. 129; 1951 S.L.T. 132 (*ultra vires*); *Winestone v. Wolfson*, 1954 S.C. 77; 1954 S.L.T. 153 (interest on I.O.U.); *Langford v. Dutch*, 1952 S.C. 15; 1952 S.L.T. 72 (repudiation of contract); *Sinclair v. Juner*, 1952 S.C. 35; 1952 S.L.T. 181 (edictal liability, *locatio custodiae*, *locatio operis faciendi*); *Anderson v. Lambie*, 1953 S.C. 94; 1953 S.L.T. 82; rev. 1954 S.C.(H.L.) 43; 1954 S.L.T. 73 (error in expression); *James B. Fraser v. Denny Mott & Dickson*, 1943 S.C. 293; 1944 S.L.T. 139; aff. 1944 S.C.(H.L.) 35; 1945 S.L.T. 2 (frustration of contract—on which also see Lord Cooper's article (1946) 28 *Journal Comp. Leg.* 1).

³⁸ 1948 S.C. 254; 1948 S.L.T. 402.

³⁹ *Lockhart v. Barr*, 1941 S.C. 578; 1941 S.L.T. 414. Whether breach of statutory duty is appropriately designated "negligence" is arguable—but see Lord Cooper's dicta in *Hamilton v. Anderson*, 1953 S.C. 129; 1953 S.L.T. 77.

of the House of Lords, however, extraneous categories which really reflect the incomplete development of the English law of torts have been superimposed on the Scottish system in certain respects—such as the liability of occupiers or lessors of premises for injury caused to persons entering on the premises; or in cases of liability for the escape of dangerous agencies from land. It is a paradox that the English Law Reform Committee⁴⁰ is now (without considering the former Scottish law) recommending a solution to problems of occupier's liability very similar to that adopted by the Scottish courts before the intervention of the House of Lords. Lord Cooper felt strongly that the intrusion of English precedents into the Scottish law of reparation had led to an unsatisfactory state of our law. "Either oil or water," he said⁴¹ "is preferable to the unsatisfactory emulsion which results from attempts to mix the two." Wherever he was free to do so, he sought to re-establish the general principle of *culpa* or fault as the measure of liability in the Scottish law of reparation.⁴² In this connection he was clearly troubled by the doctrine of *respondeat superior*—that is that an employer will be held vicariously responsible in certain circumstances to third parties injured by the wrongdoing of a servant or an agent—even though the employer was not personally at fault.⁴³ This doctrine can only be explained on grounds of expediency these days—when in some cases an employer may be precluded from selecting, from dismissing or even from controlling the actual work of the employee for

⁴⁰ Cmd. 9305, 1954.

⁴¹ "The Scottish Legal Tradition" at p. 23.

⁴² *McLaughlan v. Craig*, 1948 S.C. 599; 1948 S.L.T. 483; cf. *McPhail v. Lanarkshire C.C.*, 1951 S.C. 301; 1951 S.L.T. 32. The law of nuisance was latterly regarded by Lord Cooper as an aspect of the law of neighbourhood independent of the principle of *culpa*—see *Watt v. Jamieson*, 1954 S.C. 56; 1954 S.L.T. 56; cf. *Davie v. Magistrates of Edinburgh*, 1951 S.C. 720; 1952 S.L.T. 74.

⁴³ See, e.g., *Short v. Henderson*, 1945 S.C. 155; 1946 S.L.T. 71; *Kilboy v. S.E. Fire Area Joint Committee*, 1952 S.C. 280; 1952 S.L.T. 332; *Malley v. L.M.S. Ry.*, 1944 S.C. 129; 1945 S.L.T. 313; *Matusczyk v. Nat. Coal Board*, 1953 S.C. 8; 1953 S.L.T. 39; *Mair v. Wood*, 1948 S.C. 83; 1948 S.L.T. 326 (which is a valuable authority on the nature and liability of partnerships); *Power v. Central S.M.T.*, 1949 S.C. 376; 1949 S.L.T. 302 (where, however, the defender's contract with the pursuer does not seem to have been considered).

whose wrongdoing he is held vicariously responsible. I cannot analyse Lord Cooper's many important judgments on such questions—but may mention specifically the question of "hospital liability." As is generally known, until a decision of the First Division presided over by Lord Cooper last year, it was supposed that a hospital authority was not responsible in Scotland for the negligence of professional staff while acting in a professional capacity. The difficulty often was to determine where the frontier ran between professional and administrative functions. The decisions in *Macdonald v. Glasgow Western Hospitals Board* and of *Hayward v. Edinburgh Royal Infirmary Board of Management*⁴⁴ have rejected these distinctions and lay down, rightly I submit, that where duties are imposed by statute through the Secretary of State on Hospital Boards, they are responsible for the proper discharge of these duties, and cannot elide responsibility by pleading the professional status of persons whom they employ to carry out the actual treatment or nursing. If I may say so, though the result of Lord Cooper's interpretation of the law may not please all the medical profession, his careful and conscientious examination of the rules and principles involved is to my mind convincing. The National Health Service (Scotland) Act, 1947, applies in circumstances very different from those in which the voluntary hospitals operated.

In the law of reparation I may be permitted to mention just one further instance of Lord Cooper's moulding of the law in accordance with the needs of contemporary society—*Steel v. Glasgow Iron and Steel Co.*⁴⁵ Here Lord Cooper gave the leading judgment recognising that a man, who lost his life in the effort to save from destruction property imperilled by another's negligence, did not by his conduct bar a claim for damages on the plea *volenti non fit injuria*. After a masterly analysis of the law of England and America he continued, "The question being therefore for us an open one, it must be answered by the application

⁴⁴ 1954 S.C. 453; 1954 S.L.T. 226.

⁴⁵ 1944 S.C. 237; 1945 S.L.T. 70.

of our native principles of the law of reparation; and by following these principles to their logical conclusion I consider that the solution can be found.⁴⁶

Within the limits of one lecture one could not range over many of the leading judgments of Lord Cooper—but, on the other hand, one cannot omit reference to his judicial pronouncements on the constitutional position of Scotland and of Scottish law within the framework of the United Kingdom.

In many of Lord Cooper's judgments there will be found passages repudiating sharply the suggestion that Scottish law should follow English precedents and revolve as a satellite of the Anglo-American Common Law. It may even be that on occasion he reacted without full justification. This sensitivity is more readily understandable after perusing contemporary opinions of the House of Lords, where the opposite tendency is exaggerated—that of using in Scottish appeals English technical terms “for convenience,” or often of assuming—unless the contrary is expressly argued and established—that the principles of Scottish and English law coincide. A recent example which irked the late Lord President was the House of Lords decision reversing the Court of Session in *I.R.C. v. Glasgow Police Athletic Association*.⁴⁷ This case decided that though the word “charity” is used in English law in a highly technical sense—distinct from the popular sense in which the term is used in Scotland—the highly technical English meaning is that to be read into United Kingdom taxation statutes. Probably not since the Treason Act of Queen Anne's reign⁴⁸ have Scottish courts and practitioners been faced with so perplexing a situation. The Scottish courts are bound to apply as British law a technical English doctrine as to the definition of which there is considerable uncertainty in England—but are precluded from hearing evidence as to

⁴⁶ *Ibid.* at p. 247.

⁴⁷ 1952 S.C. 102; 1952 S.L.T. 136; 1953 S.C.(H.L.) 13; 1953 S.L.T. 105.

⁴⁸ 7 Anne, c. 21.

the meaning of the vital technical terms in English law⁴⁹ or from referring the question to the English courts. Situations such as this were calculated to gall Lord Cooper—as likewise did the English practice of declaring to be wards in Chancery, irrespective of domicile, pupils and minors who had ventured within the jurisdiction of the English courts.⁵⁰

From a constitutional standpoint, however, Lord Cooper will probably be remembered by posterity for the views which he expressed *obiter* in the so-called E II R Case—*MacCormick v. Lord Advocate*.⁵¹ The First Division led by Lord Cooper heard in that case an appeal from the Lord Ordinary on the question whether Her Majesty was lawfully designated Elizabeth II in Scotland. It was held that in fact this designation—whether or not historically accurate or politically desirable—did not depend on statutory provision at all; and therefore the court was not called on to decide whether a particular statute contravened the Act and Treaty of Union. Lord Cooper, however, dealt with the general question as to whether Parliament could lawfully override the entrenched provisions of the Union. He rejected the doctrine of unlimited Parliamentary sovereignty as inconsistent both with pre-Union Scottish theory and with the Treaty which had called into being the new Parliament of the United Kingdom. He pointed out with justice that what happened in 1707 was not just the admission of Scottish representatives to the Parliament of England, and rejected the theory that Parliament could lawfully legislate in defiance of the fundamental and essential conditions of the Union.^{51a} These views, if upheld in the future, will modify profoundly the doctrine on which most of us lawyers have been nurtured in our student days. They are the first articulate statement in two and a half centuries of the fundamental law of the British Constitution.

⁴⁹ Normally English law must be proved, *McElroy v. McAllister*, 1949 S.C. 110; 1949 S.L.T. 139.

⁵⁰ But in *McLean v. McLean*, 1947 S.C. 79; 1947 S.L.T. 36 Lord Cooper expressed himself with considerable restraint on this point.

⁵¹ 1953 S.C. 396; 1953 S.L.T. 255.

^{51a} Though the courts could not always restrain the illegality.

So much for the judicial contribution of Lord Cooper—and how inadequate a survey it is! My outline of his influence would be incomplete, however, if I did not at least mention his constant activity against what he regarded as anachronistic,⁵² inefficient and dilatory in our legal procedure. The civil jury he disapproved of in particular,⁵³ and rightly observed that it was imposed on Scotland in the interests of the House of Lords a century and a half ago when that House was familiar only with the English system where the jury was regarded as the palladium of the constitution. It is another paradox of English influence on Scottish law that today many if not most of the cases which in Scotland are tried by civil jury would be tried in England by a judge. In the interests of the litigant—whose concern with litigation is too often overlooked by lawyers—Lord Cooper advocated that simple issues involving moderate sums should be determined by a procedure less elaborate and less expensive than is appropriate for complex matters involving great sums.⁵⁴ His attitude to strict judicial precedent—another legacy of the House of Lords—was also somewhat uninhibited by modern standards; and, as I have illustrated, he would not readily acquiesce in the application of a Scottish precedent which he regarded as out of date and unsatisfactory. He might distinguish, reject the *ratio* as obscure, or apply the maxim *cessante ratione legis cessat lex ipsa*.⁵⁵ He was not violently opposed to administrative courts for the speedy determination of appropriate issues provided that the Supreme Courts were empowered to check manifest injustices and to interpret questions of pure law. He disliked undue concentration of power in any one of the three organs of government.⁵⁶

⁵² e.g., *Armstrong v. Lithgows Ltd.*, 1954 S.C. 233; 1954 S.L.T. 37.

⁵³ "Scottish Legal Tradition" at p. 25.

⁵⁴ See his address to the Society of Public Teachers of Law "Defects in the British Judicial Machine" (1953) 2 Journal S.P.T.L. (N.S.) 91.

⁵⁵ *Beiths Trs.*, *supra*, n. 34; *McGinley v. Pacitti*, 1950 S.C. 364; 1950 S.L.T. 276 (assessment of damages); *Hopkinson v. Napier*, 1953 S.C. 139; 1953 S.L.T. 99 (reputed ownership and hire-purchase).

⁵⁶ 1954 S.L.T.(News) 189.

In such leisure as he allowed himself from modern law, Lord Cooper researched deeply into the history of Scottish law—especially that of medieval times—and into questions of mutual interest to historians and lawyers. He did not accept the existence of rigid frontiers in the empire of the mind and cheerfully disregarded the maxim *ne supra crepidam sutor judicaret*. Those brief and lucid passages in his judgments by which he was wont to put the modern law in its historical perspective were the by-product of his research.⁵⁷ Probably of greater value even than the published fruits of his own scholarship—such as the Stair Society volumes and his contributions to *The Juridical Review* and *Scottish Historical Review*—is the inspiration which he has given to others to continue where he left off. He has put questions to the historians and to the lawyers which will, I earnestly hope, provoke answers of importance to both. He felt deeply the reflection that Scottish law had never produced its Pollock, Maitland or Holdsworth. Had he been granted a longer life, he might well have laid down judicial office to devote himself to the writing of a comprehensive work on Scottish legal history.

In conclusion, I may observe, Lord Cooper took an enthusiastic interest in Scottish legal education, and deplored that our law schools had not been equipped or organised to take the lead in legal development in the manner of the Universities of Paris, Harvard, Rome and Oxford. If an appeal lies from the House of Lords, surely it is to the Master of University College, Oxford, as Editor of *The Law Quarterly Review*. His Lordship was keenly interested in the institution of a comprehensive academic first law degree which would rank with, and indeed above, all others in the Universities of Scotland. He encouraged every progressive step—and urged those concerned with legal scholarship to

⁵⁷ See *Campbell's Trs. v. Campbell's Trs.*, 1950 S.C. 48; 1950 S.L.T. 82 (*valentia agere*); *Graham v. Cuthbert*, 1951 J.C. 25; 1951 S.L.T. 58 (legal aid in criminal causes); *Price v. Watson*, 1951 S.C. 359; 1951 S.L.T. 266 (possessory remedies); *Miller v. MacRobbie*, 1949 S.C. 1; 1949 S.L.T. 2 (leasehold); cf. "Supra Crepidam," p. 4; *Riddell v. Riddell*, *supra*, n. 12 (oath of calumny).

further personal efforts. The Society of Public Teachers of Law, recognising his contribution to legal education, conferred on him the rare tribute of Honorary Membership.⁵⁸ His criticism was always constructive; his help and advice were most generously given. When, for example, a lectureship in Comparative Law was instituted here, I recall that his Lordship gave the inaugural lecture in a subject which had for him great academic and practical importance. He was, incidentally, returning as Lord President to lecture in a faculty where he had been examiner in the days of Professor Mackenzie Stuart. In his lecture Lord Cooper regretted that Scottish legal scholarship in the twentieth century had neglected comparative legal studies. Though, he said, no man can be completely master of more than one system of law, an understanding of the principles of other legal systems is essential to the development of modern Scottish law—and, indeed, without the stimulus of comparative law the Scottish system would surely die.⁵⁹

On the Bench and as a scholar Lord Cooper of Culross gave himself unsparingly for the law of Scotland—which was, as has been said, the great love of his life. His judgments and his many published works of legal scholarship remain as his memorial. Above all, however, there is the inspiration of what he conceived the destiny of our Scottish law to be. The value of that contribution will in the future be assessed largely by reference to the response of the present generation of Scottish lawyers—especially law students in Scottish universities—and of their successors to the lead of a man who was indeed one of the choice and master spirits of this age.

T. B. SMITH.

⁵⁸ Lord Cooper died during the Society's Edinburgh meeting—at which it had been hoped his Lordship would take a leading part. An eloquent tribute was paid to his memory by the President.

⁵⁹ I am grateful to Dr. J. Fackenheim for notes of Lord Cooper's lecture.

CONVEYANCING PROPOSITIONS¹

IN January of the year 1838 several "propositions," as they were called, were put forward by Her Majesty's Commissioners for the reform of conveyancing accompanied by the admonition that if rash schemes of speculative improvement were to be adopted there would not be an estate in the country that would not be in the hands of law agents nor any court that would not be filled with business. It was conceded, however, that there was vast room for improvement.

Since that long past day vast improvements in the subject of conveyancing have indeed taken place, and in spite of Thomas Carlyle's realistic view that "Perfection in any kind is well known not to be the lot of man" the purpose today is to consider what room there remains for further improvement.

One step contemplated as far back as 1910 by Lord Dunedin, then Lord President of the Court of Session, and by two distinguished members of the Society of Writers to the Signet, namely, Mr. J. W. Dundas, C.S., and Sir John Prosser, W.S., was in effect the abolition of the whole feudal system, that "inexhaustible reservoir of legal antiquities and learning," as Blackstone has described it.

The most frequent impact of the feudal system on the layman today occurs when every half year the owner of a house pays his feu duty. He does so because he is a vassal or feuar, as he is better known under feudal law, and the person to whom he pays it is called his superior. In early times the relationship of superior and vassal was much more intimate and personal than it is today. Nowadays the feudal tenure is confined to a grant of land by way of feu

¹ Being the text of an inaugural lecture delivered in the University of Edinburgh on October 14, 1955.

by one person who is called the superior, because according to Erskine he stands in a higher rank than the grantee, who is styled the vassal. The feuar is given a feu charter or similar feu writ under which, in return for the land, he and all subsequent owners are required to observe certain conditions and to pay an annual money payment, called feu duty, to the superior.

The conditions in the charter commonly regulate the use of the ground and the buildings which may be placed on it. Frequently it runs to very great length with detailed provisions on buildings, boundary walls, drains, roads and so on.

There are, accordingly, three features of the modern charter on which attention may be focused, *i.e.*—

- (1) the feudal relationship itself of superior and feuar;
- (2) the restraining conditions to be found in charters;
and
- (3) feu duty.

It is not easy to discover any compelling advantage to be gained solely by the creation of a permanent feudal link between the parties on a transfer of land or a house or at any rate any advantage which cannot be conveniently incorporated as part of a straightforward ordinary transaction of sale. Professor Alexander Montgomerie Bell lecturing in 1856 obviously had doubts about the utility of the feudal system, although I do not think he was in favour at that time of its abolition, when he said “whether, if we were beginning of new, the relations of superior and vassal . . . would be introduced as a mere technicality, is not the question.” You will see that he refers to the feudal relationship as a technicality.

If it is a technicality, then the abolition of it would by itself create no maladjustment of any practical value, but there would necessarily accompany its disappearance both the ability of an owner of land to create building conditions or any kind of condition in a feu charter and to require feu duty to be paid to him.

It is beyond dispute, of course, that in the past the

imposition of building conditions by private individuals on the development of land has been beneficial to the community. Large estate owners, having land available for building, animated by a public spirit as well as by their own personal inclinations, have prescribed such conditions in feuing out their lands for development as would ensure a well-planned layout and style of building with the question of amenity well to the forefront. Frequently also neighbouring owners were able to enforce the conditions against each other in certain circumstances, and did so.

This situation of more or less private development controlled and enforced by private citizens has now been vitally affected by town and country planning legislation and in particular by the Town and Country Planning (Scotland) Acts, 1947 to 1954. As a result of the Planning Act of 1947 each local authority has or will have a development plan prepared by it covering the whole area under its control. The plan schedules or defines the uses to which the various areas under the control of the local authority may be put. Accordingly, an owner who wishes to develop his land or have it developed must first consult this development plan and also obtain approval of his detailed plans from the planning authority. He cannot feu his ground for the erection of, say, houses if the scheduled use on the plan is for industrial development or an open space.

It will be easily seen, therefore, that in these circumstances there has not been, at least since 1947, the same necessity for elaborate and detailed building conditions to be written into feu charters or for that matter any other form of title. Whether or not he wants it, the owner of undeveloped land is restricted in his own desires, and the possibility of haphazard and uncontrolled building is a thing of the past.

Admittedly, however, within the statutory limits there is still latitude, reduced as it may be, for the private person to lay down some conditions of his own. But if the feu charter is to be done away with, by what deed is he to impose such conditions? The answer is that he must prescribe them

in the ordinary conveyance or disposition by which land or a house is transferred every day by a seller to a purchaser.

It may be objected by the lawyer that conditions in a feu charter are more readily enforced because in law the superior is presumed to have an interest to enforce them whereas there is no such presumption in a disposition which creates no feudal tie between the parties. Reforming legislation, however, could enact without difficulty that conditions imposed in a disposition are to be as enforceable between the parties to it and their respective successors in the property as they would have been if they had been contained in a feu charter, provided the parties agree by some express clause in the deed that this is to be so.

On the remaining question of feu duties, these besides being a source of revenue to superiors have encouraged building by enabling builders to create feu duties over the houses they have built and sold and to derive an additional profit by collecting the annual feu duty money or selling the feu duties at a good price. Feu duties are also an investment authorised for trustees by the Trusts (Scotland) Act, 1921. There does not appear to be anything in these two features or any other features to constitute an overwhelming reason for retaining feu duties. Builders and owners of undeveloped land available for private disposal, if deprived of the means to create feu duties, can make up their lost profit, if they wish to do so, in other ways like their brethren in countries where feu duties are unknown.

The conclusion, therefore, must be that there is no insuperable barrier to the abolition of the feudal age in Scottish conveyancing. Such a verdict is not a novel one. The view of Lord Dunedin, Mr. Dundas and Sir John Prosser was that the total abolition of superiorities, although at first sight drastic as going to the root of the feudal system, presented no very great theoretical difficulties. It might certainly be judged drastic, but so, no doubt, were the major conveyancing reforms of the past, which replaced centuries of established law and practice. It is as well perhaps to bear in mind the advice of Sir Francis Bacon, "Antiquity

deserveth that reverence that men should make a stand thereupon and discover what is the best way ; but when the discovery is well taken, then to make progression." And progression in this instance would be represented by the sweeping away of the whole feudal theory.

If feu charters and superiorities were to go then so also it might be thought should the cumbersome contracts of ground annual about which nothing more requires to be said than that historically they represent mainly transactions entered into in circumstances where it was not possible to grant a feu charter.

I have said that feudalism is one of the striking features of conveyancing. A second outstanding characteristic is the *sasine register* kept at the Register House. In this register all probative deeds relating to land in Scotland are recorded. The register was set up by an old Act of 1617 and, in the words of Walter Ross, it has ever since blessed the people of this country and distinguished its jurisprudence.

Now the recording of a title in the *sasine register* does not guarantee that the title is good. What it does is to *publish* the title to the world so that members of the public acting in good faith are entitled to deal with the proprietor of a property on the basis of what is shown there without having to trouble over the possibility of there being some unknown or secret title which is being deliberately concealed from them.

The *sasine register* is a register of deeds, that is to say, it is a public library although not containing the deeds themselves but copies of them, for the deeds are not kept in the register but are copied (or photographed) at length and handed back.

This being a very brief description of the *sasine register* a contemplated reform would be to transform it from a register of deeds to what is called a register of titles, that is to say, from being a public register or library of deeds, accepting no responsibility for who is the owner of a property, it would change its function completely and

certify that a title was good and who was the registered owner. It would become a register of ownership. Carlyle quotes a proverb that "Two kitchen fires burn not on one hearth," and certainly to change the sasine register in this way might be a very controversial measure.

For more than three hundred years the sasine register has worked well. From the point of view of the public it has proved itself supremely efficient. Baron David Hume lecturing in the eighteenth century described it as "that eminent security which attends land rights in this Quarter of the Kingdom."

But several points, among others, are propounded by its detractors.

Under the law today a person has an 'unchallengeable right and title to his house notwithstanding any previous defect in the title if he or his predecessors have possessed the house for at least twenty years on a valid title or titles recorded in the sasine register. This means that on every single occasion when a house changes hands or a loan is given over it or there is some other dealing with it, the whole of the titles over at least the preceding twenty years have to be re-examined by a solicitor to see that they are in order, resulting in unnecessary duplication of work every time there is a transaction. For all this labour there would be substituted one certificate of title or land certificate under the system of registration of title. What is more, the certificate of title would be accompanied by a guarantee backed by the State.

A second criticism concerns the time factor. It is argued that the time necessarily taken up by solicitors in examining the titles on each occasion, expeditiously as this may be done, would be drastically reduced if there was a register of ownership. Transactions would be completed much more quickly and irritating delays which the public find it difficult to understand would disappear.

But the most concrete opposition to the sasine register is related to conveyancing costs, and this is a matter which

touches the public very closely. It is probably unquestionable that the introduction of registration of title or ownership would bring about a material reduction in legal conveyancing fees because of the major simplification of title which would follow. It would certainly no longer be necessary for a solicitor to examine the titles over twenty years each time, and the forms of deed for the transfer of land and houses would be much simpler and, therefore, more easily followed by the layman.

On the other hand, what would be the disadvantages of registration of title as well as the difficulties to be faced in establishing it?

It is clear from evidence given before a Royal Commission presided over by Lord Dunedin and from the various reports which it issued in 1910 that it was accepted that if some simplification of conveyancing as it then was were brought about (although not essential) it would facilitate registration of title. One of the stumbling blocks in the mind of the Commission lay in the existence of those very superiorities which have been considered. One expert, Dr. David Murray, of Glasgow, went so far as to say that the *only* basis upon which registration of title was possible was the extinction of the feudal system and the conversion of all feu duties into mere money burdens.

This is almost certainly to overrate the problem, but if superiorities were not done away with as a preliminary they would for one thing enormously increase the number of entries in the new register. There might even flare up in a minority of cases, mostly involving ancient titles, prolonged disputes as to whether or not a person claiming to be a superior could prove it by his title.

The prospect that the new system might arouse latent difficulties of title and right and provoke litigation in an otherwise peaceful property world gives pause for thought but it is desirable not to exaggerate the possibilities. In practice the number of disputes might turn out to be remarkably few or more easily capable of solution than anticipated, and much experience in the making of major

changes has now been gained from recent far reaching nationalisation and also town and country planning legislation.

Again, it has been observed that the officials of the new register would have the right before they issued a guaranteed certificate of title to object to the validity of a title on the ground that, say, it was not within the power of a person to dispose of a property where, mayhap, a trust was involved. Such a right of objection does not exist just now, the function of the sasine register being to publish writs, not to adjudicate on their validity. Two solicitors in dispute over a title are bad enough. To add a third party (the register official) who might not agree with either of them would be worse and would foster litigation—so runs the argument.

An important but temporary element against registration of title might be the initial cost of it. There would be the immediate cost of setting up the system itself and the reorganisation so far as necessary of Register House arrangements, the provision of maps to identify each property in the register, if maps were decided upon, and the expense of the preliminary official examination and clearance of each set of titles before a certificate of title was issued.

The total expenditure required and all the work and trouble involved in the change-over are again points not to be so over-estimated as to put the whole idea out of court. The expense might be considerable but the burden would be lightened for one thing by the very fact that there already exists a highly developed system in the sasine register which could be utilised and for another by the almost certain introduction of the new programme on a piecemeal basis as is happening today in England. Further, the property owner would only pull a long face at legal costs and register charges on the first occasion of registration of his title, and he might conclude it to be worth while for the sake of the lowered costs and expedition from which he would benefit in subsequent transactions involving his house. A purchaser might even be willing to pay a little more for the house because it had a registered title.

Broadly speaking, it is in fact the benefit of eventual lowered costs to the public and the greater expedition achieved in completing transactions which would require wholly to justify the change-over. These are, however, important factors which incline one to echo the views of Professor Wood who, even in 1903 when conveyancing theory and practice were not so simplified as now, was clearly of the opinion that the time had come when registration of title should be introduced. One would venture the opinion, however, that its introduction, if ever attempted, will be in face of spirited opposition, and it is not likely to come about in the near future ; but as lean Cassius said, “ Men at some time are masters of their fates ” and we should not hesitate to take in hand the replacement of the centuries-old sasine register if that would be a forward step.

Now, if the way for registration of title would be smoother were there no superiorities there would be fewer problems still to confront in introducing it if there was no such thing in Scotland as the form of deed known as the *ex facie* absolute disposition.

There are three types of deed in Scotland which may be used on the occasion of a loan being given on the security of heritable property, say, a house, *i.e.*—

- (1) the bond and disposition in security ;
- (2) its close relative, the bond of cash credit and disposition in security ; and
- (3) what is termed the *ex facie* absolute disposition.

If a bond and disposition in security is the loan document it will only provide security over a house as the law stands at present for a loan given at or before the date when the bond is recorded in the sasine register. That is not to say that it is not possible to have a second or future loan secured over the same property but to do so another bond must be granted for it. The bond of cash credit represents a statutory modification of this position inasmuch as by Act of Parliament a cash credit bond can be utilised where a fluctuating cash credit loan is given, as, for instance, by a bank, but the Act nevertheless pays heed to a common law

rule that you cannot have an indefinite or unknown money burden secured over heritage, and it prescribes the maximum loan for which security is given by the cash credit bond.

The absolute disposition skirts all these difficulties by taking the form not of a bond over the house but of an actual absolute conveyance of the house to the creditor, so that when he records the disposition in his favour he is, so far as the sasine register and the public at large are concerned, the actual owner of the house and not just a creditor although the real owner (*i.e.*, the borrower) continues, of course, to occupy the house. The true bargain of loan between the owner and the lender is contained in a separate, private, written agreement which they make between them. The creditor thus being the owner of the house according to the title and not just the holder of a bond over it the ordinary law does not apply to him. He can, therefore, give as many loans as he pleases and when he likes. The one disposition in his favour will give him security for them all.

This accounts for another difference. If the creditor holds a bond he must faithfully observe statutory procedure which has been laid down for a sale of the house should that step be necessary to record the loan, and the main criticism which may be levelled at that procedure is that it is too slow. If the debtor will give the creditor no assistance in the procedure, then a sale (which must be by public roup) cannot be effected by the creditor under a minimum of four months if the upset price does not exceed £1,000, and four and a half months if it does exceed £1,000, and it must be remembered that there has probably been a protracted period earlier during which the creditor has been patiently attempting to get his money by negotiation with the debtor.

But the creditor under an absolute disposition, as the apparent owner of the house, can sell it at any time unhampered by statutory procedure, as quickly as he pleases and by private treaty if he is so inclined. There are other differences between the two forms of security which are equally unjustifiable in practice, as between two creditors.

In these circumstances it may be observed with feeling that for an owner to have to make over his house to his creditor when he obtains a loan, however good the reasons may be, and whatever may be the protection given to the debtor, instead of taking the obvious course of granting a bond over it, savours of long gone unenlightened times. Professor George Joseph Bell in his *Commentaries on the Law of Scotland*, published in 1870, remarks how unwilling any proprietor must be to grant an absolute conveyance of his estate by which he must cease to appear in the world as proprietor of it. Times and views have changed since then and the absolute disposition is now a common and accepted form of loan document but that does not affect the validity of the criticism.

Certainly the absolute disposition affords a flexibility in loan transactions which is exceedingly convenient but if simplification of conveyancing procedure is a desirable goal, as it must be, then one possibility would be to dispense with it provided the ordinary bond can be modified so as to incorporate most, if not all, of the advantages of the absolute disposition. If registration of title was seriously contemplated there might be a powerful reason for the step inasmuch as the State might well hesitate to give its absolute guarantee that the creditor was the owner of the property simply because the title was registered in his name as owner.

Without the absolute disposition there would remain the two standard forms of bond and it should require no great strain on human ingenuity to vary by legislation one or other of them to enable second or future loans to be made which would be secured over a house by the one bond in the same way as the absolute disposition does at present. The principle of the cash credit bond that there should be a maximum limit of loan secured would doubtless be retained but some thought might be given as to what maximum should be fixed.

As part of the reform there would also be a review of the statutory procedure of sale under a bond with the object at least of speeding it up.

In short, the law on security documents would be simplified and made more intelligible to the public, giving effect to one of the two requisites considered by Lord Macaulay essential in the framing of laws that they should be easily understood.

So much for heritable subjects—land and houses. Is any improvement possible in conveyancing forms relating to moveable property? In one respect at least forms for dealing in that kind of property contrast unfavourably and that is in regard to their length.

As regards deeds relating to heritage, Alexander Duff writing in 1838 said it must be confessed “that the forms of our conveyances might with considerable advantage be shortened and it is believed that the great majority of the profession would cordially approve of a remedy to the redundancy which exists in our styles”—a sentiment with which no doubt everybody concurred. Shorthand methods, so to speak, have, however, now long been a feature of heritable styles or deeds. Acts of Parliament since at least 1847 have provided short forms of clause to be used in deeds, defining what they are to mean.

The provision of short forms of clause in this way and for that matter short forms of deed, leaving their interpretation to Act of Parliament, has very considerably reduced the length of writs relating to heritage, a most laudable object although it may not make legal documents any more easy to understand for the layman who has to sign them.

This praiseworthy idea has not been adopted to any extent in writs relating to moveable property or rights. In consequence everything has to be set out at full length in these deeds in order to cover the numerous contingencies which may arise and the result appears to be uncommonly long to the impatient client. Something could surely be done by legislation with advantage to shorten moveable forms of title and bring them more into line.

It cannot be pretended that the subjects named so far exhaust all the possibilities for improvement and simplification in conveyancing. For one thing a consolidating statute

is desirable. Conveyancing legislation still in force covers many Acts of Parliament going back at least to the seventeenth century. England has had her consolidating statutes since 1925. Support would also be forthcoming for the abolition of such items as multures and teinds which are a source of complete puzzlement to the public if not to the legal profession. And, of course, one cannot overlook the possibility of significant changes in conveyancing law and practice should the recommendations made at the end of 1950 by Lord Mackintosh's Committee on Succession ever pass into law.

All such matters as I have sketched are not by any means intended to cast any reflection on the sterling quality of the Scottish law of conveyancing as it has evolved throughout history but to adopt the words of Dean Inge in his *Essay on Patriotism* pride in the past and ambition for the future usually go together, and we must ever be alert for possibilities of improvement.

To conclude, I feel confident that all these propositions, some possibly accepted some rejected by him, and many more have been present in the mind of my distinguished predecessor, Professor Harry Henderson Monteath, Writer to the Signet, whose intellectual energy and whose scholarly talents have contributed so notably to the dignity and reputation which this Chair has faithfully maintained during his tenure of office.

G. L. F. HENRY.

MEMORY VERSES OF THE ROMANO-CANONICAL PROCEDURISTS

MODERN principles of pedagogy are disposed to look askance upon artificial mnemonic devices as aids to the mental retention of facts. According to latter-day ideas such devices are too crude and primitive to be accorded any real place in the scheme of education. But for an older day the so-called *versus memoriales* or memory verses were the most valuable of pedagogical tools. How, for example, can the history of formal logic fail to record the hexameters associated with the name of Petrus Hispanus concerning the moods of the syllogism: "*Barbara, celarent, darii, ferioque prioris; cesare, camestres, festino, baroco secundae*," etc.? And for generations the English student of Latin obtained an important quota of his grammatical knowledge from the versified rules appearing in Lily's Latin Grammar, as, e.g., those concerning the gender of nouns and those relating to the conjugation of verbs.¹ Instances of the sort still maintain some footing in other than academic fields. One may recall the rhymed sailing direction "Green to green, red to red; perfect safety, go ahead," and the more furtive existence preserved by such mnemonic rhymes as those which give the day-span of the months "Thirty days hath September, April, June and November" etc., or enumerate the signs of the zodiac "The ram, the bull, the heavenly twins," etc.

For the study of English law this species of *memoria technica* seems not to have had much place, though David Murray's entertaining book² calls attention to the two sets of such verses in FitzHerbert's *New Natura Brevium*, the

¹ This book originally consisted of two parts, *A Shorte Introduction of Grammar* and *Brevissima Institutio seu Ratio Grammatices*, published separately in 1567. The Latin rules appeared in the *Institutio*. A reprint with introduction by Vincent J. Flynn, President of St. Thomas College, has been published in the United States (New York, Scholars' Facsimiles & Reprints, 1945). As to the career of the grammar, see *Introd.* pp. iv *et seq.* For this reference I am indebted to Miss Elaine E. Teigler, Reference Librarian of the Gary Library of Law, Northwestern University.

² David Murray, *Lawyers' Merriments* (1912) pp. 60-61.

one defining the order in which different parcels of land are to be specified in the writ of right patent, and the other setting forth the matters in respect of which the assize of nuisance is in order. On the Continent, however, and in the sphere of Romano-canonical legal influence, the case was far otherwise. An outstanding example, relating to the *Corpus juris canonici* itself, is the metrical short-hand syllabus of the five books of the *Liber Extra*, viz., *Judex, judicium, clerus, connubia, crimen*. And one cannot go far in the medieval jurists without encountering numerous instances of the kind. The procedurists seem to have been especially fond of the practice. Procedural learning was put in metrical form, even to the extent of minor treatises such as the *Ordo judicarius* of Eilbertus Bremensis³ and the like entitled work of Dinus Mugellanus.⁴ But what we would speak of here is not the metrical tractate, but the scattered verses—*carmina*⁵—which embody particular fragments of procedural doctrine. These are not without some lodgment in English treatises on ecclesiastical law,⁶ but appear to have lingered in Spanish procedural literature longer than anywhere else. Febrero's eighteenth-century work⁷ is especially rich in this regard, and it is not unusual to meet with a quotation of the sort in present-day treatises on Spanish procedure.⁸

³ In *Quellen zur Geschichte des römisch-kanonische Processes im Mittelalter* (ed. Waehrmund, 1906) Vol. I, Book 5.

⁴ *Quellen, supra*, Vol. II, Book 1, Appendix to *Ordo judicarius "scientiam."*

⁵ The term *carmen*, apart from its basic sense of "song," has a long history of various usage. In the earlier Roman period it was applied to religious or legal formulae (Lewis & Short, *Latin Dictionary*, s. v. *Carmen*). It acquired also the meaning of "incantation," and frequently had a sinister implication, as in the *carmen famosum* of Dig. 22, 5, 1. 21 (see Vicat, *Vocabularium juris utriusque*, second ed. 1760, s. v. *Carmen*). In the Middle Ages the word was commonly applied to didactic verses of different descriptions. Its employment for the present purpose was specifically a medieval practice. For the Roman law proper in its flourishing period such a practice apparently did not obtain. While certain of the writings of the Roman jurists exhibit some instances of metrical sentences in the statement of legal rules, these probably were accidental. See, on this point, Kalb, *Wegweiser in die römische Rechtssprache* (1914) p. 143, citing Scipio Gentilis, *Parerga* II, 31.

⁶ See Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (second ed. 1700) pp. 92, 402-403; Law, *Forms of Ecclesiastical Law* (second ed. 1844) pp. 149, 283.

⁷ Febrero, *Libreria de escribanos* (1789-90). See, in particular, Parte II, Lib. I, Tom. I, Cap. I.

⁸ See Manresa y Novarro, *Comentarios á la ley de enjuiciamiento reformada* (second ed. 1905) III, pp. 8, 195, 198; Palacio y Herranz & Miguel y Romero, *Tratado de*

Of the instances in question well known is that which, credited⁹ to Hostiensis,¹⁰ summarises the contents of the complaint or *libellus*:

*Quis, quid, coram quo, quo jure petatur et a quo
Recte compositus quisque libellus habet.*
(The one who sues and the thing in quest,
The judge to whom the cause will come,
The right on which the claim must rest,
The person sued: for these in sum
The contents justly manifest
Of a properly drafted libel.)¹¹

Among the numerous commentaries on this passage important place must be awarded to Maranta in his *Speculum aureum* for the clarity of his exposition. He writes of the libel that "first, it ought to contain *quis*, that is, the name of the plaintiff or [in criminal matters] the accuser: suppose Titius sues or accuses; secondly, *quid*, that is, the thing sued for in the libel, which the plaintiff ought to designate by two boundaries or two descriptions, for otherwise it might be called obscure . . .; thirdly, *coram quo*, that is, the name of the ordinary judge or the judge delegate before whom the libel is laid. It is, however, not necessary to express his particular name; the plaintiff may do so if he wishes, but it suffices to mention him by the name of his office so that

procedimientos judiciales (second ed. 1925) pp. 668, 771; Miguel y Romero, *Principios del moderno derecho procesal civil* (1931) pp. 302, 326, 512.

⁹ See Durantis, *Speculum juris*, Lib. IV, Partic. I, *Rubrica de libellorum conceptione*, § 4 (ed. of 1574) p. 57, note a, probably of Johannes Andreae.

¹⁰ Henricus de Segusia, a renowned canonist of the 1200's, known usually as Hostiensis from the fact that he was Cardinal Bishop of Ostia, under the appointment in 1261 of Pope Urban IV. So highly was his learning esteemed that he was commonly spoken of as *pater canonum*, *fons juris*, *monarcha juris*, *stella* or *lumen lucidissimum Decretorum*. Most noted of his works is the *Summa super titulis decretalium*, generally referred to as his *Summa* (von Schulte, *Geschichte der Quellen und Literatur des canonischen Rechts* (1877) II, pp. 123 et seq.). The instant verses are from the *Summa*, Lib. II, *Rubrica de libello oblatione* (ed. of 1537) fol. 178.

¹¹ Conset, *op. cit.*, p. 403, gives us the following version:

"Each Plaintiff and Defendant's Name,
And eke the Judge who tries the same;
The thing demanded, and the right whereby,
You urge to have it granted instantly:
He doth a Libel right and well compose,
Who forms the same, omitting none of those."

there is certainty of the person ; fourthly, *quo jure petatur*, that is, it ought to contain the conclusional clause : for example, I demand one hundred, because I loaned it to the defendant etc., or [in criminal matters] I demand his punishment, because he committed such and such an offence etc. For, if the conclusional clause is not alleged, the libel does not proceed, as if I say, I demand one hundred, because the King is in France . . . But it is not necessary to express in the libel the name of the action ; it suffices that the facts are so alleged that it can be inferred from their allegation what action is being put forward . . . fifthly, it ought to contain *a quo*, that is, the name of the defendant sued. These five conditions concurring, the libel will be properly framed. So much is true in civil matters, but in criminal matters other solemnities are required which appear in the libel of accusation . . .”¹²

The same directions find expression in the somewhat less abruptly phrased tristich :

Conventi nomen et nomen convenientis

Judicis et nomen scribes, causam petendi

*Et quascumque petas res, omnes scribere debes.*¹³

(Name of the defendant, name of plaintiff, too,

Name of the judge as well, the ground on which you sue,

The redress sought : all these you write, it is the libel's due.)

No profundity of doctrine appears in either set of verses, but attention to the data which are furnished undoubtedly operated to save the tyro considerable embarrassment and delay. Indeed, most would agree that modern statements of claim would suffer no harm if the draftsman had a similar check-list constantly before his eyes.

Extensively quoted have been the rhyming verses concerning the contents of the oath of calumny (*juramentum calumniae*). In the Romano-canonical system this oath occupied an important place as a step in the cause. Required of both parties, it was to be taken immediately after the

¹² Maranta, *De ordine judiciorum, vulgo Speculum aureum et lumen advocatorum* (ed. of 1570) Pars. VI, p. 401.

¹³ *Summa minorum* of Magister Arnulphus, in *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* (ed. Wahrmund, 1908) Vol. I, Book 2, p. 16.

litiscontestation. "It is intended to prevent every species of chicanery, and its terms must, therefore, be comprehensive enough to cover, as far as possible, all contingencies of this character. Thus the plaintiff is required to swear that he will suborn no one, that he will not unjustly seek extension of time, that he will adduce his proof without imposition on the court. The defendant, on the other hand, whose oath follows that of the plaintiff, swears that he believes he has a good defence to the plaintiff's demand."¹⁴

The verses accordingly run:

*Illud juretur quod lis sibi justa videtur
Et si quaeretur, verum non inficietur,
Nihil promittetur nec falsa probatio detur,
Ut lis tardetur dilatio nulla petetur.*

(Take oath each party must that to him his cause seems just, And that; when questioned fair, the truth he will declare, That bribes he'll never try or proof will falsify, Or seek the cause to stay for naught but sheer delay.)¹⁵

Like the first-mentioned verses concerning the composition of the libel, these are attributed to Hostiensis.¹⁶ For the Scottish law they have a peculiar interest, since to that law they owe the unique distinction of having been made a legislative text. As noted by Mr. Murray¹⁷ and with more detail by Dr. Baird Smith in his learned paper on the oath in question,¹⁸ they were textually embodied in an Act of the Scottish Parliament of March 1429-30, which required the taking of the oath as in the verses prescribed. Incidentally, as suggested by Dr. Baird Smith, this circumstance affords

¹⁴ Engelmann, "The Romano-canonical Procedure," in Engelmann-Millar, *History of Continental Civil Procedure* (1927) p. 471.

¹⁵ Or, as phrased in Conset's *Ecclesiastical Practice*, *ut sup.*, p. 92:

"You this shall swear, That this your Suit doth seem,
Right, Just to be: at least in your esteem.
That you (when askt) the Truth will not deny:
Nor promise aught: Neither that knowingly
You any false Proofs will imploy,
Nor urge Delays, the Cause to 'noy."

¹⁶ See Sir George Mackenzie, "Observations upon the Statutes," p. 183 in Vol. I of *Works* (1716), cited by Baird Smith, "A Note on Juramentum Calumniae" (1939) 51 *Juridical Review*, p. 7. The verses appear in Hostiensis, *Summa, ut sup.*, fol. 190 and in Tancred, *Ordo judicarius* (ed. Bergmann, 1842) p. 205.

¹⁷ *Op. cit.*, p. 59.

¹⁸ "A Note on Juramentum Calumniae," *ut sup.*

one of the definite indications of the influence of the Romano-canonical procedure upon the Scottish law.

Next may be noted the lines defining the cases in which a party has placed himself in contempt :

*Non veniens, non restituens, citiusque recedens,
Nihil dicens, pignusque retinens, jurareque nolens,
Obscure loquens: isti sunt in jure rebelles.*
(The one who fails to come when sought,
Or restitute what's due,
Or leaves the court before he ought,
Or fails to speak when ordered to,
Or pledge detains 'gainst court's command,
Or grossly fails to take his oath,
Conformably to right demand,
Or in his words is nothing loath
Obscure of speech to stand:
No one of these will judge exempt
From penalty for dire contempt.)

In harmony with these lines, Hostiensis tells us that "one is contumacious who comes into the presence of the judge, but does not make himself known or make known a representative whom the judge may recognise, but rather lurks behind pillars and benches . . . Contumacious also is he who does not come, or does not wish to answer, or who answers obscurely . . . or who leaves without permission . . . So, if he fails to make restitution in accordance with the precept of the judge, in which case the thing is forcibly taken from his possession . . . or does not exhibit a thing pursuant to order . . . or if he hides or otherwise contrives to evade service of citation, or fails to take an oath devolving upon him . . . or makes no defence."¹⁹

In the field of proof we meet with a number of these verses. Such are the hexameters enumerating the *media probandi* legally available :

Aspectum, sculptum, testis, notoria, scriptum,

¹⁹ Hostiensis, *op. cit.*, fol. 210.

*Jurans, confessus, presumptio, fama, probabunt.*²⁰

(Of means of proof this is the list :

Inspection rightly granted, that is, of man or thing,
A sculptured work, if relevant, and none needs to insist
That writing mostly operates convincingness to bring.
The witness always holds high place,
Notorious facts are tallied here,
The oath, besides, has ample case,
This fact from old is always clear ;
Confession, too, must here salute
Presumption and all manner of repute.)

The inclusion of *sculptum* is somewhat puzzling at first sight, but this matter is cleared up when we read in Hostiensis that "proof is made by ancient books and by ancient writings incised on marble blocks, whence the verses speak of *sculptum*," and under the same head of *sculptum* come sealed episcopal letters.²¹ It is apparent from Hostiensis' own text that the nine items of the verses are not an exhaustive list, and from the *Conclusiones probationum* of Mascardus we learn that the number of species is differently arranged and catalogued by different authors. Mascardus, himself, following Durantis, sets the usual number at twelve, but is definite in declaring that for full-proof there are seven special kinds, namely, (1) witnesses, (2) written instruments, (3) confession, (4) evidence of the fact (inspection), (5) oath, (6) just presumptions, and (7) repute ; while for half-proof (*semiplena probatio*) the number is four, that is to say, (1) evidence of a single witness for the plaintiff or the defendant, (2) comparison of a suspected writing with the genuine, (3) private writings, and (4) less urgent presumptions.²²

In the same field we are advised of the qualifications of a witness :

Conditio, sexus, aetas, discretio, fama,

²⁰ *Ibid.*, fol. 224, 225 ; Mascardus, *Conclusiones probationum*, Vol. I, Qu. IIII (ed. of 1609) p. 5.

²¹ Hostiensis, *op. cit.*, fol. 225, 226.

²² Mascardus, *op. cit.*, Vol. I, Qu. IIII.

*Et fortuna, fides; in testibus ista requires.*²³

(The witness must with rule align
In point of status, sex, and age,
Discretion with fair fame combine,
Be sound of faith in word and sign,
And have estate as norms define.)

The witness, in order to be rated as a classic witness whose word is equivalent to half-proof, must be thus measured. This obviously was under the flourishing era of the formal proof system. In the matter of testimonial evidence two witnesses were necessary for full-proof, a rule that to a considerable extent prevails in Scotland today, and until 1948 was fully subscribed to in Sweden. But in the era of which we speak this was but the nucleus of a complicated system which dealt with fractions of proof, and in large measure reduced the judge to the position of a mechanical accountant. To the classic witness were necessary the qualifications expressed in the verses. First, the witness must be of proper social condition; the slave or outlaw was not permitted to testify. Secondly, the rule as to sex must be conformed to: women were usually barred from testifying in criminal causes or testamentary litigation. Thirdly, the witness must be of lawful age. Tancred tells us that generally the age is fixed at fourteen years for civil causes, but in criminal causes at twenty. Hostiensis, as to civil causes, says that the witness must have attained the age of puberty. Fourthly, sound discretion is indispensable, which signifies that none is to be heard who is not of sound mind. Fifthly, the witness is to be of good repute, and particularly is he to be excluded if by his acts he has become infamous. Sixthly, he must in some jurisdictions possess a certain amount of property. Concerning the doctrine held in certain quarters that a pauper cannot testify, Tancred expresses the view that if the witness is honest, so that

²³ Hostiensis, *op. cit.*, fol. 226; Tancred, *op. cit.*, p. 225. In the *Summa minorum* of Magister Arnulphus, *Quellen, ut sup.*, Vol. I, Book 2, p. 43, there appear the two additional lines:

*Et consanguinei pariterque domestica turba
Et clericus laicum a se fugat et vice versa.*

no presumption arises against him that he would swear falsely for money, he is not to be prevented from testifying. And, seventhly, the religious faith of the witness must be unexceptionable; no heretic is permitted to testify.²⁴

Again, we are similarly apprised of the qualities which must be possessed by a confession before it is competent to effect proof:

*Major, sponte, sciens, contra se, ubi jus sit et hostis,
Certum, nec natura, favor, lis, jusve repugnet.*²⁵

(To be received as means of proof confession must appear
As made by one of major years with knowledge and free will;
It must against his interest run, find its pronouncement sheer
Before the court and in the cause its function to fulfil,
Presumptive favor of the law it cannot reprobate,
Nor can it come from one who shares the litigation's fate;
With certainty it must ever speak, and is shent by fatal flaw,
If anything in it contained flouts nature or the law.)

The meaning is that (a) the person confessing must be major, that is to say, he must have attained the age of thirty years; (b) the confession must be voluntary; (c) it must be made with knowledge of the fact confessed; (d) it must be against the confessing person's interest; (e) made in the course of the hearing, and (f) in the presence of the adversary (*hostis*). So, too, (g) it must have certainty, as where one confesses owing a debt, the confession must state the amount. Moreover, (h) the question of *favor* may arise to prevent the confession from operating. As where one confesses that he is a slave when he is in fact free, the *favor* which the law accords to liberty renders the confession inoperative. And

²⁴ Hostiensis, *op. cit.*, fol. 226 *et seq.*; Tancred, *op. cit.*, pp. 223 *et seq.*

²⁵ Tancred, *op. cit.*, p. 211; Hostiensis, *op. cit.*, fol. 218 *et seq.*; Aegidius de Fuscarariis, *Ordo judicarius, Quellen, ut sup.*, Vol. III (Half Vol.) Book I, p. 80; Mascardus, *op. cit.*, Vol. I, p. 24. As given in Mascardus, *loc. cit.*, the verses are:

*Major, sponte, sciens, contra se ubi jus sit
Nec natura, favor, lis, jusque repugnat, et hostis.*

Another version (Hostiensis, *loc. cit.*) has:

*Victus dicatur: si certum quid confiteatur,
Major, contra se, compos dominus, sciens,
Ultero: iudice, parte, foro, presentibus,
Actio dum sit, porro jus istis,
Favor, et natura resistit.*

(i) the reference to *lis* signifies that the person confessing is not to be one involved actually or potentially in litigation concerning the subject-matter of the confession. Finally, (j) the confession must not be such as runs counter to nature, as where one confesses to an impossibility, or (k) is contrary to law.²⁶

So, also, we are told how the judge (or notary) is to proceed in the examination of witnesses:

Auditus, visus, personae, scientia, causa,

Fama, locus, tempus, ac certum, credulitasque.

*Dum testes recipit iudex, haec cuncta notabit.*²⁷

(The judge as he proceeds apace in interrogation's scope

Will thus with each of witnesses full diligently cope:

Ask what he saw and what he heard as well,

Find how he knew the things he has to tell,

Ask him about repute, and cause him clear to state

What persons there were present, for this he must relate,

Inquire how credulous he is, but always stay to see

How far he speaks his instant part with certainty's degree.)

For enlightenment we may profit by turning to the eighteenth-century Spanish work of Febrero. Thus, if the witness heard the litigants, or heard another who testifies, let him state the time and place and the name of him who spoke, or if he saw him, on what day and in what place this occurred, and at what hour and who was present. If he knows the litigants, let him state how long he has known them, and the reason of his knowledge, and how he comes to know what he declares, also if he knows the cause of the litigious fact and of the bringing of the suit. If he knows these matters with certainty, on what does he found this certainty, or if he states them on belief, what is the reason for his belief. If of the matter in question or of its being as he says, there is public repute in the vicinity, let him

²⁶ Damasus, *Summa de ordine judiciario, Quellen, ut sup.*, Vol. IV, Book 4, pp. 27, 28; Hostiensis, *loc. cit.*; Aegidius de Fuscariis, *op. cit.*, p. 80; Tancred, *op. cit.*, pp. 211-212. With reference to *lis*, however, the meaning, according to Tancred, is that the confession must relate to the very matter which is in controversy, p. 212.

²⁷ Hostiensis, *op. cit.*, fol. 231 *et seq.*; Febrero, *op. cit.*, Parte II, Lib. III, Tom. I Cap. I, § VII, no. 317, p. 189.

state when it began to manifest itself ; if it existed from the beginning of the litigation or before, how did it come to exist and who knows its origin, in such wise that he gives the reason of his statement (since if he does not give it, it does not serve except in certain cases where the law considers hearsay or belief).²⁸

As Tancred phrases the case, " the judge ought diligently to interrogate the witness with relation to everything bearing upon the cause, through which he is better able to elicit the truth, namely, concerning persons present, place and time, his sight or hearing, his knowledge or belief, common repute, and his certainty, and all ought to be taken down in writing . . . And this, therefore, let him do, that it may be known how far faith is owing to the words of the witnesses, because there are five diversities which derogate from the credit to be extended to witnesses. Whence the verse :

Res, persona, gradus, locus, haec sunt consona, tempus."²⁹

(On point of person, place and time

The witnesses must speak as one,

So also on relation's grade,

Should such a question run.)

That is to say, properly to effect full-proof there must be agreement of the witnesses as to the points mentioned. " For," says Damasus, " if in a real action witnesses are produced to testify concerning the matter, and they disagree as to the *res* to be proved, their testimony does not avail, since in that testimony they represent but single witnesses . . . *Persona*, because, if they ought to testify as to the persons present, and one speaks of one person and the other of another, their testimony fails for the reason just mentioned. *Gradus*, because if they are produced as to a question of consanguinity, and they are not in unison as to the degree of relationship, their testimony is ineffective . . . Every disagreement, however, is not prejudicial, because if one spoke of Johannes as of the first degree, and the other as of the second, this does not injure, inasmuch as certain

²⁸ Febrero, *loc. cit.*, pp. 189-190.

²⁹ Tancred, *op. cit.*, p. 238 ; Damasus, *op. cit.*, p. 47.

authorities place sons in the first degree and certain others grandsons . . . If, however, one witness says that the subject is in the first degree, and the other that he is in the third or last degree, then this spoils the testimony. *Locus*. As to place the witnesses ought to agree, as appears from the example of Daniel in rejecting the testimony of the elders, which disagreed as to place. Also, in point of *tempus* they must agree. But when it is said that the witnesses must agree as to place and time, some understand that this is true only as to a fact not capable of repetition, such as that of homicide, as if Titius is declared by one to have been killed on Monday and by another on Tuesday, since they say it is impossible for both things to be true. Otherwise in the case of iterable facts, because if one says that Titius committed adultery with Titia on Monday and the other on Tuesday, either of these facts can be true, and, although in disagreement as to the proof of the one crime, that is, of adultery in specie, they nevertheless prove Titius to have been an adulterer." But the author goes on to say that there are divergent opinions as to this matter of iterable facts, and speaks of certain other particulars in which minor disagreements do not invalidate the proof.³⁰

This rule of concordance is strikingly characteristic of the prevailing system of probation which, starting with the general rule of *testis unus, testis nullus*, sought to reduce the evaluation of proof to artificial regulation. It was a system which left little or no room for the application of the judge's inmost conviction; its central test was not whether the proof convinced the judge, but whether it met the mechanical canons which were prescribed in that regard.

Finally, we note the verses which indicate the cases in which an appeal is not allowable:

*Appellare vetant scelus, excellentia, pacta,
Contemptus, minima res, interdictio facta,
Arbitrium, res quae perit, et si longius acta.*
(An appeal is barred if what it would seek
Is to aid or protect an iniquitous act,

³⁰ Damasus, *loc. cit.* See also Hostiensis, *op. cit.*, fol. 233.

Or to question decree of all-highest court,
 Or to fly in the face of litigants' pact.
 To one in contempt no appeal may avail,
 Or to one whose cause is a trifle,
 Or to one by interdict bounden to fail,
 Or arbitrament seeking to stifle.
 Nor is any appeal where the cause cannot tarry
 Until the appellate proceedings have run,
 Or when so redundant the bulk of the writings
 That perusal of these is something to shun.)

Scelus signifies "wickedness," "iniquity." In the case of certain atrocious crimes where the guilt of the offender has been proved by witnesses and his confession, there may be no appeal from the conviction. And, generally, if an appeal would enable a convicted defendant to pursue an open and notorious course of crime, an appeal is not permitted, for *appellatio non debet praesidium iniquitatis*. *Excellentia* refers to the court from which the appeal is sought to be taken. The meaning is that there is no appeal from a court of last resort, such as the Pope or the Emperor. *Pacta*, that is to say, agreements of the parties that neither will appeal from the judgment, which naturally bars the appeal, even if such an agreement arises only by implication. *Contemptus*: for it is a commonplace of the system that by the general rule *contemptus non appellat*: a person standing in contempt has no right to appeal. *Minima res*, that is to say, where the matter in question is of insignificant value: an application of the maxim *de minimis non curat lex*. *Interdictio facta*, that is to say, where the appeal is forbidden by the interdict of a court of higher authority. This prohibition may come only from the *princeps*, namely, the Pope or the Emperor. *Arbitrium*. It is established that the award of an arbitrator is not subject to appeal, because he lacks judicial jurisdiction. Nor may this rule be changed by agreement of the parties. *Res quae perit* refers to the case where the *res* involved is such that the matter will not admit of the delay incident to appeal, as where the object is to undo absolution from an excommunication or to prevent

the opening of a testament or to stop a funeral from being proceeded with. *Longius acta* would appear to signify the case of inordinate prolixity in the appeal writings.³¹

Such are the principal items of the medieval procedural *carmina*. Rough cast as our translations, the verses themselves cannot lay claim to any high standard of literary excellence. Yet, with all their crudity, one cannot but admire the ingenuity with which the technical and immalleable terms of art are woven into the pattern without doing violence to the metre. In the nature of things this feature is altogether lost in the translations which, while seeking to preserve the substantialia of the several rules, are wholly without means of reproducing the compactness and succinctness of the originals. Had the latter, we might add, been able to draw upon Placentinus, whose poetic gifts are extolled by Kantorowicz,³² they might have embraced contributions of more polish, but, regrettably, his juristic verses fall outside the present category. Remarkably enough, the ranks of the medieval procedurists included Cino da Pistoja (Cinus Pistoriensis) who was one of the foremost poets of the Italian renaissance, a friend of both Dante and Petrarch.³³ It does not appear, however, that he directed his talents toward infusing more elegance into the procedural *carmina*.

ROBERT WYNESS MILLAR.

³¹ On these points, Tancred, *op. cit.*, pp. 302-303; Durantis, *op. cit.*, Pars II, Partic. III, *Rubrica de appellatione*, § 2, pp. 832 *et seq.* The reference to *longius acta* seems to have had little or no currency outside of Tancred. In this regard his text as printed in the Bergmann edition (see *supra*, note 16) reads "*est si longius acta*," but as quoted in Johannes Andreae's note to Durantis, p. 836, the reading is "*et sic longius acta*" (see Tancred, notes 131 and 132 to p. 303) which we have followed as being the more probable. How far there was here involved a prohibition of definite acceptance we do not know. In any case, we should doubt if it was more than a disciplinary measure intended to discourage undue wordiness in the appeal writings of the appellant's advocate and a fault which was capable of repair.

³² See his *Studies in the Glossators of the Roman Law* (1938) p. 203.

³³ See Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. VI (second ed. 1850) pp. 84-85.

RECENT LEADING SCOTTISH CASES

By DAVID M. WALKER, PH.D., Advocate, Professor of
Jurisprudence in the University of Glasgow

A recent case of some interest was *Graham v. Robert Younger Ltd.*, 1955 S.L.T. 250, 1955 J.C. 28. In that case a publican had

CONTEMPT OF COURT— on his estates. One of his assets was an interest
Jurisdiction— in a partnership in certain licensed premises.
forum for appeal. The award of sequestration did not make

express reference to the interest in the licensed premises and after the award the publican continued to go to the premises and take part in the conduct of the business, acting on the view that it was not affected by the award of sequestration. He was then haled to court and the position made clear, while a solicitor on his behalf gave an undertaking that he would keep away from the premises. Yet next day he went back and reasserted his claim to participate in the conduct and management of the business. He was again apprehended and brought before the Sheriff-Substitute who committed him to prison as being in contempt of court. He then brought a bill of suspension in the High Court to regain his liberty. The High Court had no difficulty in holding that the breach of a solemnly given undertaking was undoubtedly a contempt of court for which he had rightly been committed to prison. The point seems novel but the decision is salutary for it is essential that there should be adequate sanction for the breach of undertakings and it would be well for the profession and the public to note the decision. Proceedings in court are regularly sisted, continued, or even abandoned on the giving, personally or by counsel or solicitor, of a solemn undertaking to do something or to desist from some other conduct, and the settlement of disputed matters on undertakings, without their having to be litigated to decision, would be seriously prejudiced if it were to be thought that no consequences would follow the breach of an undertaking. Lord Birnam in particular affirmed the general power of the court to

punish such contumacious conduct as a contempt of court. The second point which arose was of the competency of the appeal by bill of suspension to the High Court from imprisonment for contempt in a civil court. On this matter it was observed that both Court of Session and High Court had jurisdiction to entertain an appeal by way of suspension in the present case, the civil court doubtless on the ground of appeal from a step in the procedure of a lower civil court, and the criminal on the ground of its being an appeal in a matter of imprisonment and punishment affecting personal liberty. The form of appeal adopted, the bill of suspension, is of course ambivalent with a civil aspect issuing in suspension and interdict and a criminal in suspension and liberation.

The Sheriff Court has recently supplied, as it not infrequently does, a case of surpassing interest and not inconsiderable juristic importance in the shape of *Cameron v.*

Hamilton's Auction Marts Ltd., 1955 S.L.T. **NEGLIGENCE—**

(Sh.Ct.) 74, a case which has raised the old difficulty of whether the rule of *Re Polemis* [1921] 3 K.B. 560 is or is not a part of the law of Scotland. It has to be observed first that this decision was pronounced after a debate on the relevancy or legal sufficiency of the pursuer's pleadings and no evidence had been led, the debate being based on the sufficiency of these pleadings, if accepted *pro veritate*, to justify the holding of a proof. The question of awarding damages would not arise until after the proof and depended in part on its effect. The facts alleged by the pursuer were, briefly, that two cows were despatched by a farmer (called as second defender) to be sold by auction in the premises of the first defenders. When the cows were delivered to the mart and were being driven along a passageway there one bolted through an unsecured gate, into and along the public street where it climbed the stairway above the pursuer's china shop, and then fell through the ceiling of the upstairs premises and the ceiling of the rear of the shop. In its struggle the cow turned on a water tap so that the shop was flooded, and it knocked over, trampled on and destroyed goods in the shop. The first defenders were alleged to have been in

Remoteness of
damage—whether
Re Polemis
represents
Scots law—
cow in china shop.

fault by not taking reasonable care to prevent the escape of animals; the animal in question was also averred to be in a more excited state than the majority of cows, a fact seen and appreciated by the first defenders' servants. On these averments the major question for decision was that of the liability for letting a beast escape into the street, there being no allegation that the defenders knew of any special vicious propensities on the part of the cow. It was further pleaded in defence that, even if there were liability for negligence, the damage suffered by the pursuer in consequence of the escape "was not a reasonably foreseeable consequence of such negligence . . ." and was hence too remote to import liability. The secondary question accordingly raised the issue whether, *esto* there was any liability, liability for consequences was limited to foreseeable consequences or extended to all direct physical consequences, as was suggested in *Re Polemis*.

On the first point the learned Sheriff held that there might be "liability for a domestic animal without *scientia* [of a vicious propensity] on the ground of failure in controlling its movements in a city when circumstances make it reasonable to take precautions," and held that the averments entitled the pursuer to prove, if she could, her two grounds of fault, *viz.*, insufficient fastenings on the gates in the mart and failure to take care to see that the exits from the mart were secured. With the decision thus far few would want to quarrel, and the appropriate course would consequently appear to have been to allow a proof of these averments, probably a proof before answer. The Sheriff did not take that line but dismissed the action altogether on the ground that the damage alleged was not a foreseeable consequence of the negligent escape, and in taking this course it is respectfully submitted that he was wrong and premature. The mistake arose from failing sufficiently to distinguish the two problems (a) whether there is negligence, or relevant averments of negligence, and (b) whether the resulting damage is (i) a foreseeable consequence of that negligence, or (ii) a direct physical consequence of that negligence. The problems are neatly called "culpability" and "compensation" in *Re Polemis* and in *Bourhill v. Young*, 1942 S.C.(H.L.) 78, 85, 1943 S.L.T. 105. These two problems (a) and (b) are distinct, and possibly determined by different criteria: (a) is determined by foresight, in

that a man is negligent, or is relevantly averred to be negligent, if some damage to the pursuer was a reasonably foreseeable consequence of his acts or omissions in question; but (b) may be determined (i) by the test of reasonable foresight, or (ii) the test of directness of physical consequences. The two problems have repeatedly been run together in Scottish cases and books (Glegg on *Reparation*, 4th ed., at pp. 38-9 still exhibits the old confusion) and repeatedly cases dealing with "culpability" are cited on problems of "compensation." The distinction is clearly drawn in Pollock on *Torts* (15th ed.), p. 23 and Salmond on *Torts* (11th ed.), pp. 152-3. The proper course here, it is submitted, would have been to allow a proof before answer and then to decide (1) if there was negligence and (2) which, if any, of any proved resultant damage was (i) foreseeable, or was (ii) a direct physical consequence, and thus to decide which of these criteria, "not-*Polemis*" or "*Polemis*," should be applied. The Sheriff rather went beyond the needs of the case in further indicating *obiter*, that, *esto* there was liability for negligence and that it extended to reasonably foreseeable consequences thereof, what happened was not reasonably foreseeable but was due to a *nova causa interveniens*, namely the collapse of the upper floor. (But should an upper floor be able to take the weight of an enraged cow?) It was further indicated, also *obiter*, that, *esto* the rule of *Re Polemis* was good law in Scotland and that in consequence liability for negligence extended to direct physical consequences of the negligence in allowing the cow to escape, even though not foreseeable, the learned Sheriff thought the chain of causation broken by the failure of the floor so that the precipitation of the cow and what it did below was only an indirect consequence and thus too remote to sound in damages. In these *obiter* observations the Sheriff was on firmer ground though it seems questionable whether the averments in the case were such that he was entitled to reject the pursuer's claim without proof, thereby holding that even if the first defenders were negligent in letting the cow escape none of the damage which resulted was legally attributable to that negligence by reason of the intervention of the *nova causa* breaking the chain of causation. That is a possible view, though the writer doubts whether he could have shared it. Nevertheless, we should be very grateful to the

learned Sheriff for the valuable expression of his views which have not only his judicial authority but additional weight as coming from the learned author of the excellent articles on "Reparation" and "Negligence" in the *Encyclopaedia*. It is a most interesting case and deserves careful examination. The issue whether or not *Re Polemis* is the law of Scotland is still not settled but in any future discussion of the problem this case will have to be considered.

Plank v. Magistrates of Stirling, 1955 S.L.T. 330¹ raised the problem of whether a child resorting to a children's playground provided by a local authority was an invitee or merely a licensee of the authority. The circumstances were that the child had fallen from the platform of a chute and been injured. The trend of English authority had been to treat such a person as only a licensee but Lord Strachan held her to be an invitee, thereby making the local authority liable for the faulty condition of the chute. He found authority for this view in the judgment of Lord Kinnear in *Stevenson v. Glasgow Corporation*, 1908 S.C. 1034, 16 S.L.T. 302 and in the English cases of *Baker v. Bethnal Green B. C.* [1945] 1 All E.R. 135 and *Pearson v. Lambeth B. C.* [1950] 2 K.B. 353, which cast doubt on earlier English decisions which had suggested that persons resorting as of right to premises provided and maintained by the local authority were licensees, and also indicated that he did not agree with the English view that the child in *Taylor v. Glasgow Corporation*, 1922 S.C.(H.L.) 1, 1921 2 S.L.T. 254 (the red berries case) was a licensee only. The contrast in consequence between this view and the view of the English courts in *Bates v. Stone Parish Council* [1954] 1 W.L.R. 1249, a case where a child was held a licensee on very similar facts, is striking. Lord Strachan further went on to hold that, even if the child were only a licensee (and he could not be any less), the defenders were liable since the danger was one of which they must have been aware. This part of the decision is noteworthy as applying to Scotland the doctrine of constructive

¹ [Affirmed on appeal to Second Division of the Court of Session on November 25, 1955.—Ed.]

knowledge of danger, where the defective apparatus is, as in this case, such that a reasonable man would have appreciated the dangerous quality.

The latest round in the battle of the liability of hospital authorities for their staff is *Fox v. Glasgow and South-Western Hospitals Board and Another*, 1955 S.L.T. 337.

It raised the question of the liability of the board for the alleged negligence of a nurse who had taken part as theatre sister in an operation performed by two consulting surgeons (against

**HOSPITAL'S
LIABILITY—
Nurse attending
operation.**

whom no claim was made, at least in that process). A swab was left in the patient's body after an abdominal operation, in consequence whereof, it was alleged, he had died. It was argued that the board was not liable for any negligence on the part of the nurse on the ground that the nurse was at the relevant time acting under the control of the surgeon in charge in the theatre, though it was admitted that the nurses in question were servants of the board of management. This argument was an attempt to revive some of the old and now superseded arguments of *Hillyer v. St. Bartholomew's Hospital* [1909] 2 K.B. 820, but it was held without much difficulty, and manifestly with justification, that the board was liable, on the view that under the Health Service Acts the duty of the hospital is to treat the patient (including nursing him during an operation). There was no allegation that the nurse was merely carrying out without negligence some direction given her by the surgeons. Such an averment, if made, *might* have brought her within the exemption figured by Lord Greene M.R. and Mackinnon L.J. in *Gold v. Essex C. C.* [1942] 2 K.B. 293, 299, 307, on the basis not of having ceased *pro hac vice* to be a hospital servant and having become a servant of the consultant surgeon, but of not being guilty of negligence if she faithfully carried out the orders of the surgeon, however negligently these might be given. This decision follows almost inevitably from the attitude taken by the First Division in the important cases of *Macdonald* and *Hayward* last year. Since it is the duty of the hospital authorities to treat the patients and not merely to provide premises and opportunities to meet skilled medical men

it is hard to see how they could avoid liability for employed nurses as much as for employed doctors. Only the case of the specialist consultant seems now to remain in doubt.

Ironside v. Ironside, 1955 S.L.T. 352 was a slightly hard case for the pursuer but undoubtedly correct in law. A wife brought an action claiming divorce on the ground of

DIVORCE— incurable insanity based on the fact that her
Insanity— husband had been under continuous care and
interruption of treatment for at least five years as an insane
period of care person. But after about four years' detention as
and treatment. insane the husband had escaped and remained at large for 32 days before being found and again admitted to hospital and again certified as insane. He had remained there continuously for a further three years at the date of the action. It was held that in accordance with the Lunacy (Scotland) Act, 1866, s. 6 the original detention order had lapsed after he had enjoyed 28 days' freedom and that the five years' period had accordingly been interrupted for four days; in consequence the pursuer's averments were irrelevant. A hard decision, it may be, but unimpeachable on the terms of the statutes, this case settles a matter previously doubtful.

RECENT LEADING ENGLISH CASES

By W. A. ELLIOTT, M.C., B.L., Advocate, and of the
Inner Temple, Barrister-at-Law

The rights of a father of an illegitimate child under English law were fully canvassed in the recent adoption case of *Re M.*

[1955] 3 W.L.R. 320. The Adoption Act, 1950

(14 Geo. 6, c. 26), which also applies to Scotland,

provides by sections 2 (4) (a) and 3 that an

adoption order shall not be made except with

the consent of every person who is a parent or

guardian of the infant, subject to certain

specified exceptions when the court can dispense

with that consent. The mother of a twelve-

year-old illegitimate child and her husband

applied to the court for an adoption order in respect of the child,

but the father refused his consent. The judge then refused

the adoption order as he considered there were no grounds

which enabled him to dispense with the father's consent. On

appeal the Court of Appeal held that the father was not a

"parent" within the meaning of the Adoption Act and that his

consent was therefore unnecessary under section 2 (4) (a). It

was explained that the consents required under the Act were

essentially linked with the transfer of rights which follow an

adoption order; but in the case of a father of an illegitimate child

there were no rights at common law to be transferred.

It is of some interest that this decision was recently followed

by the First Division in a petition for custody, *A. v. B.*, 1955

S.L.T. 436, although the Sheriff Courts have been wont since

1950 to require the consent to adoption of fathers of illegiti-

mate children. One difficulty facing the First Division was

that under section 2 (1) of the Illegitimate Children (Scotland)

Act, 1930 (20 & 21 Geo. 5, c. 33), the court may, upon

application by the father of any illegitimate child, make such

order as it thinks fit as to its custody, having regard to the

welfare of the child and the conduct of the parents. It was

ADOPTION—
Consent of
parent—Whether
consent of father
of illegitimate
child necessary
to adoption
order—Adoption
Act, 1950.

argued that this statutory provision gave the father under Scots law a new right in relation to his illegitimate child. The court, however, held that no such "right" was thereby conferred and accordingly as the father had still no rights in relation to his illegitimate child he was not a "parent" whose consent was required in terms of the Adoption Act. It appears to follow that the mother of an illegitimate child is its only "parent" for the purposes of the Adoption Act.

It is gratifying that the Scottish courts have thus been able to reach the same conclusion as the English Court of Appeal on an interpretation of a United Kingdom statute. With a different background of common law, however (and, as here, sometimes even of statute law), this result cannot always be so readily achieved.

In *Davis Contractors Ltd. v. Fareham Urban District Council* [1955] 1 Q.B. 302, the plaintiff firm of building contractors agreed to build 78 houses for the defendant

CONTRACT— urban district council within a period of eight
Delay in months for a fixed sum. They attached to
completion— their form of tender a letter stating "our
Quantum meruit. tender is subject to adequate supplies of material and labour being available as and where required to carry out the work within the time specified." Owing to the national shortage of labour after the war, itself due to the unavoidable and unforeseen lag in demobilisation, the work took 22 months to complete. In these circumstances the contractors contended that the contract was void and they claimed to be entitled to be paid on a *quantum meruit* basis a sum of £17,258, being the excess over the contract price. In argument the plaintiffs' counsel laid great weight upon the case of *Bush v. Whitehaven Port and Town Trustees*, 2 Hudson's B. C., 4th ed., p. 122, where a contractor agreed to build a water main during the summer months but the trustees for whom the water main was to be built, did not make the site available until the winter thereby causing extra costs. In that case the contractor was not held to his contract but was allowed to claim an additional sum on a *quantum meruit* basis. That case, however, was regarded by the

court as being not a true frustration case but an example of the equitable principle that a man shall not be allowed to take advantage of a condition brought about by himself. If, in the course of carrying out a contract, a fundamentally different situation is brought about by the conduct of one of the parties, then, even though his conduct may not be in breach of contract, he will not be allowed to take advantage of the new situation to the detriment of the other party when it would be unjust to allow him to do so. But there was no ground in the present case for relieving either party of his obligation where, without the fault of either of them, there had been an unexpected turn of events rendering the contract more onerous than the parties had contemplated.

Another recent English contract case of importance to mercantile law is *Martin-Baker Aircraft Ltd. v. Canadian Flight Equipment Ltd.* [1955] 3 W.L.R. 212. By an agreement dated August 26, 1951, the plaintiff company, manufacturers of aircraft ejection seats and allied products, agreed "to permit" the defendant Canadian company "to manufacture, sell and exploit" all their products on the American continent and not to make any similar agreements with any other party on the American continent. The agreement also provided for the exchange of technical information and for the payment of royalties every six months. The plaintiff company subsequently desired to terminate this agreement while the Canadian company contended that it was terminable only by mutual consent. The court held that the agreement should not be approached with any presumption in favour of permanence. Notwithstanding that it was a bare permission, or licence, to manufacture, it was a contract in the commercial or mercantile field such as the law merchant would not normally regard as intended to constitute a permanent relationship; and the question therefore whether or not it was determinable depended solely upon the true construction of the contract and fell to be regarded upon the basis of reasonableness. Upon that basis the agreement was not one which the parties could have intended to be

**CONTRACT—
Commercial
agreement—No
provision for
determination—
Whether
presumption of
permanence.**

permanent and, accordingly, there being nothing in the contract inconsistent with that view, the agreement was, on its true construction, determinable unilaterally on reasonable notice.

The injustice that sometimes results where persons benefit from building work executed in excess of government licence and then refuse to pay the builder (who in the circumstances can have no remedy) was circumvented in the recent case of *Strongman* (1945) *Ltd. v. Sincock* [1955] 3 W.L.R. 360. An architect owner contracted with builders to supply materials and carry out work at his premises, and promised orally that he would obtain all the licences necessary at that date under Regulation 56A of the Defence (General) Regulation, 1939. Work considerably in excess of the licences granted was then carried out. In an action by the builders claiming the balance of the price over the licensed amount, it was held, in accordance with past precedents, that the price could not be recovered as the contract was illegal. As an alternative ground of action, however, the builders contended that the owner was liable in damages for a similar amount for breach of the warranty to obtain the licences. It was held by the court that the assurance given by the architect did amount to a warranty or collateral contract that he would obtain the supplementary licences or stop the work if he could not obtain them; that as the builders in the present case had not been morally to blame or culpably negligent they were entitled to recover damages for breach of warranty, since they had been led to commit the criminal offence by the promise or misrepresentation of the architect. It should be added that it was proved that, as between architect and builder, the primary obligation to obtain licences was by universal practice admitted to be on the architect. As Denning L.J. forcibly stated "It is, of course, a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable."

CONTRACT—
Pacta illicita
—Collateral
warranty.

The case of *Flowers v. George Wimpey & Co. Ltd.* [1955] 3 W.L.R. 426 is of some interest to Scottish practitioners involving, as it does, an interpretation of the Law Reform (Personal Injuries) Act, 1948, s. 2 (1). This subsection provides that in assessing any person's damages for personal injuries there shall be taken into account against any loss of earnings, etc., one half of the value of "any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning when the cause of action accrued." The plaintiff was injured in the course of his employment with the defendants as a result of which he obtained severe bruising and shock. A tumour subsequently developed as a result of which he did not return to work for about a year. When the plaintiff's action for damages was heard the trial judge found the defenders to blame for the accident but held that, as the tumour was not caused thereby, the court could take into account loss of earnings only during the period of about four weeks when the plaintiff was suffering from bruising and shock. As the plaintiff had received since the date of the accident industrial injury benefit and industrial disablement benefit exceeding twice the amount of lost earnings, he was accordingly not entitled to any damages for loss of earnings at all.

**ASSESSMENT
OF DAMAGES
—Insurance
benefits—Law
Reform (Personal
Injuries)
Act, 1948,
section 2 (1).**

His insurance benefits, of course, had been assessed and paid by the insurance authorities on the basis that the tumour had been caused by the accident regarding which the court formed a contrary opinion. It was forcibly contended for the plaintiff that if this were so then the "rights" accruing after the four-week period could not in law be regarded as having accrued from his personal injuries and should not be "taken into account." On this question the court held that the word "rights" in this context was used not in a jurisprudential but in a commercial sense, for it comprehended benefits actually received and the right to any future benefits likely to be payable consequent on the blows constituting the accident; and that the "value" of such "rights" was precisely the insurance benefits received. "Taken into account" was used in a book-keeping sense and did not confer upon the court any wide discretion as to what sums in respect of benefits received should be taken into consideration.

RECENT PRIVY COUNCIL CASES

Nisbet Shipping Co., Ltd. v. The Queen ([1955] 1 W.L.R. 1031) was an appeal from a judgment of the Supreme Court of

Canada which had affirmed in part and reversed in part the judgment of the Exchequer Court in Canada. On February 13, 1945, H.M.C.S. **COLLISION—**
Limitation of liability.

Orkney and the appellants' vessel, the SS. *Blairnevis*, were in collision. The Exchequer Court held the *Orkney* alone to blame and that the Crown was not entitled to limit its liability under the Canadian Shipping Act, 1934. The Supreme Court reversed the latter part of that decision, one of the judges dissenting. The question for determination before the Board was whether or not the Crown was entitled to claim the benefit of the provisions of section 649 of that Act, which provided: "(1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur, without their actual fault or privity, that is to say . . . (iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, be liable to damages . . . to an aggregate amount exceeding 38 dollars and 92 cents for each ton of the ship's tonnage." By section 712: "This Act shall not, except where specially provided, apply to ships belonging to His Majesty."

The Board stated that the appeal raised a question of very great difficulty. It was, they said, difficult to think of words more wide and comprehensive than those of section 712, the phrase "except where specially provided" emphasising that no implication without express words would suffice to bind the Crown or presumably to confer a benefit on the Crown. But the respondent first urged that, as a matter of construction, the section did not apply to Her Majesty as the owner of a ship but only to the ships themselves. Secondly—and that was the argument which prevailed in the Supreme Court—that section 712 was in effect irrelevant to a claim by the Crown to avail itself of the provisions of section 649. Before 1887 the doctrine *respondeat superior* did not apply to the Crown, which was not

therefore liable for the tortious acts of its servants. In that year the Supreme and Exchequer Courts Act was passed and section 16, which was amended from time to time, now provided that the Exchequer Court should have original and exclusive jurisdiction to hear and determine “(c) every claim against the Crown arising out of . . . injury . . . to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.” It was not questioned that those words were apt to give jurisdiction in the present case, but that jurisdiction only arose by an amendment made in 1938 [see s. 19 (c), R.S.C., 1927; c. 34, as amended in 1938], that was, after the passing of the Canadian Shipping Act, 1934. It had been held by such cases as *City of Quebec v. The Queen* ((1892) 24 S.C.R. 420), *Filion v. The Queen* ((1894) 4 Ex.C.R. 134), *R. v. Armstrong* ([1907] A.C. 500; 40 S.C.R. 229) and *Gauthier v. The King* ((1916) 56 S.C.R. 176) that the Exchequer Court Act not only conferred jurisdiction on the court but also imposed liability on the Crown. The question, then, was what was the measure of liability which was not defined by the Act, but was to be inferred from the creation of jurisdiction. It was not disputed that at least those circumstances which gave rise to a claim between subject and subject would support a claim by a subject against the Crown. It was an easy step to say that a subject was not entitled to any greater relief against the Crown than he would be against a fellow-subject. The right to limit liability, in both England and Canada, was given by statute, and was a right almost universally established in the law of nations and of considerable antiquity. It would, therefore, be easily assumed that the Crown, assenting to the imposition of a new liability, would secure for itself the advantage at least of limiting it in a manner so generally conceded. One of the judges of the Supreme Court stated: “Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages.” The basic rule referred to was that under which it was said that the sovereign might avail himself of the provisions of any Act of Parliament.

Those were weighty considerations, and they prevailed with

the judges of the Supreme Court except the dissenting judge, but in the opinion of the Board they did not explain why full effect should not be given to section 712. In 1934 that section could have had no operation with regard to the liability of the Crown, since such liability was not imposed till 1938. But it did not follow that, when liability was imposed, the provisions of section 712 could be ignored. In the United Kingdom the Crown Proceedings Act, 1947, specifically enacted that the sections of the Merchant Shipping Act, 1894, should apply to limit the liability of the Crown, and similar provision was made in Canada by section 3 (4) of the Crown Liability Act, 1953 [which received the Royal Assent after the date of the judgment of the Supreme Court in the present case]. But that Act could not be treated as decisive of the meaning and scope of section 712 of the Canadian Shipping Act, 1934. Yet it was precisely the provision which, if the liability of the Crown had been established before 1934, would have been appropriately inserted in that Act as a special provision excluding the operation of section 712. The fact that it was not so inserted because the necessity for it was not then foreseen could not deprive section 712 of any part of its meaning and effect. The right to limit liability derived solely from a section of an Act which unequivocally enacted that the Act was not to apply, except where specially provided, to ships of Her Majesty. There was no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applied to proceedings between subject and Crown the law which it applied between subject and subject, therefore it should apply even that law which, by the terms of the statute enacting it, was expressly excluded from application to the Crown. Section 16 of the Interpretation Act (R.S.C., 1927, c. 1) enacted that no provision or enactment in any Act affected in any manner whatsoever the rights of Her Majesty unless it was expressly stated therein that Her Majesty was bound. That provision, however, appeared to have no relevance to a statute which expressly enacted, as the Act of 1934 did, how far the rights of the Crown should be affected. In section 712 the relevant word was "apply," which appeared adequately to cover any provision whether it created an obligation or conferred a benefit. The Exchequer Court was also right in rejecting the argument that a distinction could be drawn between the words in section

712, "ships belonging to His Majesty" and such words as "His Majesty" *simpliciter*. The appeal was accordingly allowed.

Samuel Aladesuru and Others v. The Queen ([1955] 3 W.L.R. 515) was an appeal by special leave from a decision of the West African Court of Appeal. In May, 1953, the appellants were convicted in the Supreme Court of Nigeria on two counts of an indictment which charged them, being directors of the Standard Bank of Nigeria, Ltd., with, in one count, making, and, in the other, with publishing, the balance sheet of the bank as at March 31, 1952, showing certain particulars which were false to their knowledge with intent to deceive any member, shareholder or creditor of the bank contrary to section 436 (a) of the Criminal Code (Laws of Nigeria, 1948). The main ground of appeal was that the West African Court of Appeal had struck out certain of the appellants' grounds of appeal in the notice of application for leave to appeal without hearing arguments thereon, and had thereby deprived the appellants of a right of appeal granted by statute whereby justice had been denied to them. Particular complaint was made in the notice "that judgment is against the weight of evidence." The Board stated that section 10 of the West African Court of Appeal Ordinance (Laws of Nigeria, 1948, c. 229) gave a right of appeal against convictions as there stated, and by section 11 (1): "The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. . . ." Archbold's *Criminal Pleading, Evidence and Practice* (33rd ed., p. 346) correctly stated that: "In order to succeed an appellant must show, in the words of the statute, that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence." The notice of application contained five grounds, and leave to appeal having been granted that notice, by rule 49 of the West African Court of Appeal Rules (Rules of Court, No. 2 of 1950), became the notice of appeal. The court was entitled to reject any particular

"WEIGHT OF EVIDENCE"—
Inaccurate phrase.

ground which was not within the terms of the statute, and they did that with regard to ground No. 1. In their judgment they referred to the difference between civil and criminal appeals in that respect, and said that, even if they had granted an amendment of the ground of appeal, they would not have been disposed to hear arguments on facts. With regard to the reference to an amendment there was nothing before the Board to show that counsel for the appellants in the Court of Appeal made any application to amend ground No. 1 so as to make it accord with the terms of the statute, or that at any stage he suggested that his real case was that the verdict was wholly unreasonable. On any view it might well be that on the facts the court could not have given the necessary leave on the ground of unreasonableness, and it was not contended to the contrary before their Lordships.

Cases cited, mostly from the early English Criminal Appeal Reports, contained in the headnotes the phrase "against the weight of evidence," and it was submitted that that phrase had thus been treated as synonymous with "unreasonable or which cannot be supported having regard to the evidence." That phrase was inaccurate and could not properly be substituted for the words of the statute, although it had in one or two cases found its way into the judgments, though always with qualifying language. The Nigerian Ordinance gave no appeal on such ground, but that did not mean that in a proper case the Court of Appeal would not give leave to appeal or review the evidence if a *prima facie* case was shown that the verdict appealed from was one which no reasonable tribunal could have arrived at. It certainly had not been established that the Court of Appeal had acted in a manner which would warrant the Board's intervention on the ground of any fundamental defect in the administration of justice.

As to the second ground of appeal, it was said that there was no sufficient evidence that the appellants were properly appointed directors of the Standard Bank of Nigeria, Ltd. The Board referred to the relevant matters and said that it was not necessary in the present case to express any opinion whether it was essential to establish a breach of section 436 of the Criminal Code of Nigeria, to prove that the accused person had been duly appointed and was properly qualified to act as a director, or

whether it was sufficient—as counsel for the Crown contended—to show that he had been acting in that capacity, since they were of opinion that, assuming proof of due appointment was required, there was evidence in the present case from which the court could draw the inference that the appellants had been duly appointed directors of the Standard Bank of Nigeria, Ltd. The appeals were accordingly dismissed.

Gustavo Romeo Vincenti v. Stephen J. Borg ([1955] 1 W.L.R. 1137) was an appeal from a judgment of the Court of Appeal of Malta which affirmed a judgment of the Civil Court of Malta granting to the respondent a declaration that he had on September 3, 1948, validly exercised a right of pre-emption in respect of certain immoveable property situated in Malta. The only ground urged in the present appeal was that section 1520 (2) of the Civil Code of Malta barred the respondent from exercising that right. The Civil Court, on July 24, 1946, made an order that the property in question be sold by auction, and on June 20, 1947, a sale notice appeared in the *Government Gazette* that an auction would take place on July 18, 1947. On July 17 the sale was adjourned. On December 30, 1947, a second sale notice appeared in the *Gazette* stating that the sale would take place on January 22, 1948. On that date and also on January 29, and February 19 and 26, 1948, the sale was further adjourned. Finally, on February 28, 1948, the auction was held and the property “adjudicated” under the relevant sections of the Code of Organization and Civil Procedure of Malta to one Theuma for £21,300. The law of Malta permitted higher bids to be made after the auction. Such bids were made and the property was finally adjudicated to the appellant on April 1, 1948, for £32,200. On September 3, 1948, the respondent, acting as attorney for two nieces, exercised a right of pre-emption. It was the validity of the exercise of that right which was being challenged. The advertisements of the two sales, though published in the *Government Gazette*, were not served (though permissible under certain provisions of law) on the respondent or the parties on whose behalf he acted. The latter were, at all times material to the advertisements and the sale, absent from Malta.

**IMMOVABLE
PROPERTY—
Right of
pre-emption.**

Section 313 of the Code provided that after the lapse of a stated period "the Court shall, upon the demand of the creditor or of the debtor to be made by application, appoint one or more days for the sale by auction, and order the issue of advertisements." Section 315 (3) provided, with regard to immovable property: "The posting up and publication of the advertisement shall, unless the Court otherwise directs, take place . . . at least 15 days before the day appointed for the sale by auction." Section 356 provided (1) that no person other than the debtor could exercise a right of pre-emption or repurchase if the advertisement of the auction had been served on him as prescribed by the section; (2) that the right to exercise it by persons entitled to do so ceased after four months from the date of the registration of the act of adjudication in the registry. A later enactment, the Civil Code, in dealing with rights of pre-emption, provided by section 1520, in respect of sales by judicial auction, (1) that the right "shall not be competent to the persons to whom notice of the proposed sale was given by service of a copy of the advertisement mentioned in section 314 of the Code of Organization and Civil Procedure. (2) The provisions of this section shall also apply to absent persons if the said advertisement shall have been published in the *Government Gazette* at least one month before the date fixed for the sale." Section 1520 thus extended the limitations on rights of pre-emption imposed by section 356 of the earlier Code. The only point argued on the appeal was that the provision in section 1520 (2) barred the respondent from exercising a right of pre-emption. The appellant contended that the publication of the advertisement in the *Gazette* of December 30, 1947, complied with the terms of section 1520 (2), and, therefore, that it was not competent for the respondent, who was an "absent person," to exercise a right of pre-emption. The respondent denied that the terms of section 1520 (2) had been satisfied.

The Board stated that between the notice of sale on June 24, 1947, and the date fixed for sale, and between the notice of December 30, 1947, and the date fixed for sale, the interval of time was less than one month. To preclude "absent persons" from exercising their right of pre-emption there must be an interval of "at least one month" between the date of publication and "the day fixed for the sale" (s. 1520 (2)). If the

words "the day fixed for the sale" meant the day fixed in the notice for the sale, neither notice satisfied the requirements of the section. If the appellant's contention were correct that "the day fixed for the sale" did not mean the day fixed in the notice but the actual day of the sale, February 28, 1948, more than a month would have elapsed between the date of publication of each of the notices and the "day fixed for the sale," and the terms of the subsection would have been complied with. The interpretation for which the appellant contended of the words "day fixed for the sale" was contrary to the natural meaning of the words in their context—namely, the day fixed in the notice for the sale, and, if a departure from that meaning were possible, it would be for some strong reason.

The appellant also argued that the "day fixed for the sale" in section 1520 (2) should not be confused with the day "appointed" for the sale in section 313 (1). The Board did not think that any significance should be attached to the different words used. They were appropriate in the context of each subsection to indicate the day on which the sale was to be held. Reliance was placed on sections 1396 and 1397 of the Civil Code, and it was said that a sale did not take place until there had been a concluded contract, and that the "day fixed for the sale" could not be ascertained until a contract had been concluded. The words "day fixed for the sale," on the meaning of the word "sale" for which the appellant contended, would mean the day fixed for the conclusion of the contract and could be determined whether or not a contract was concluded on that day. What the appellant was striving to contend was that "the day fixed for the sale" meant "the day of the sale," ignoring the words "fixed for."

The Board stated that they were unable to accept the contention of the appellant that section 1520 (2) was enacted for the protection of a purchaser, and that no interpretation of it should be adopted making it possible, by fixing the date of sale at less than one month from the date of publication of the advertisement in the *Gazette*, to take away the protection afforded. To mitigate the uncertainty consequent on a possible exercise of rights of pre-emption after a judicial auction the legislature, with regard to immoveable property, by section 356 placed a time limit for the exercise of those rights and took away

altogether the rights from persons other than the debtor on whom the advertisement of the auction had been served. Section 1520 (2) provided an alternative to service of the advertisement in the special case of "absent persons." Publication of the advertisement in "the Government *Gazette* at least one month before the date fixed for sale" would deprive "absent persons" of their rights of pre-emption. By section 315 a 15 days' interval only was necessary between publication and the day appointed for sale, and an advertisement in the *Gazette* was not compulsory. The legislature appeared to have imposed the necessity for publication in the *Gazette*, and for that publication to be at least one month before the sale, for the benefit and protection of persons entitled to rights of pre-emption. Even if it were otherwise the consequence which the appellant suggested, referred to earlier, did not justify a departure from the natural meaning of the words "fixed for the sale." The appeal was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. MIDDLETON, B.A., LL.B., Advocate, Sheriff-Substitute of the Lothians and Peebles

It is very well established that a criminal judgment cannot be used as evidence of the truth of the facts decided by it in subsequent civil proceedings. The rule was recently re-affirmed by the Court of Appeal in England in *Hollington v. Hewthorn* ([1943] K.B. 587) in spite of strenuous efforts on the part of counsel to circumvent it. The Court of Appeal emphatically disapproved of all authority to the contrary, such as the dictum of Evans P. in *Re Crippen* ([1911] 1 K.B. 149, P. 108) to the effect that a conviction is admissible in evidence as presumptive proof of the commission of a crime where the convicted person seeks to enforce rights resulting from his crime. But *Hollington v. Hewthorn* has not disposed of doubts as to the soundness of the rule, and the question is examined by Professor J. A. Coutts in a paper contributed to the Fourth International Congress of Comparative Law which appears in the *Modern Law Review* for May, 1955. He distinguishes a number of reasons which have been alleged for the rejection of convictions in subsequent civil proceedings. These, however, overlap or express approximately the same idea in different language. To understand why, on principle as opposed to precedent, the rule is maintained, it is only necessary to look to the powerful judgment delivered by Goddard L.J. (as he then was) in *Hollington v. Hewthorn*. A criminal conviction is inadmissible because it amounts merely to an opinion of another court and is irrelevant to the issue to be determined in the civil court. Moreover, in practice evidence of a conviction cannot usefully be admitted, for it would be necessary in most, if not all, cases to hear absolutely the same evidence over again in the subsequent trial. "Once the defendant challenges the propriety of the conviction," Goddard L.J. pointed out, "the court in the subsequent trial would have to re-try the criminal case to find out what weight ought to be attached to the result." If the criminal conviction were to be treated as conclusive of guilt, this would not, of course, be so. But it is not, and could not seriously be, argued that the criminal conviction should be regarded as conclusive, since the issue in the civil case is necessarily different from the issues in the criminal trial. Take, for example, the case of an action of damages arising out of a collision between two motorists, as in *Hollington v. Hewthorn*. The fact that one of them has been convicted of careless driving cannot by itself be decisive against him in the civil case. It may be that, while only one of the motorists was convicted, both were guilty of carelessness, but the other was needed as a prosecution witness, or for some other reason was not charged. The issue in the criminal case is simply, did X drive carelessly? In the civil case it is more complicated, namely, did X by his careless driving cause damage to Y, and if so, what compensation ought Y to receive from him? It is not enough to show that X drove

THE EFFECT OF A CRIMINAL JUDGMENT ON A CIVIL ACTION

carelessly and that Y suffered damage. A causal connection between the two facts must be established, and in order to fix the damages it is necessary in addition to find out the degree of blame attaching to X. It is possible for X to have been rightly convicted of careless driving and yet to be in no way responsible for Y's damage, for his carelessness may be unconnected with the collision, though contemporaneous.

At most, therefore, a previous criminal conviction could be considered as raising a presumption of fault which would be open to rebuttal. And in some cases evidence of the conviction would be prejudicial as well as unhelpful. On the other hand, it is true that the existing rule is anomalous because, although evidence of the conviction is excluded, this does not prevent it from coming out in cross-examination in the civil proceedings, to much the same effect as if it had been proved. There are other arguments which may be advanced against the existing rule. For example, a principal witness for one of the parties may become unavailable by reason of the fact that the civil action is delayed until after the criminal proceedings. Professor Coutts, though he states the various arguments on one side and the other impartially, is evidently unfavourable to the strict standard of exclusion reaffirmed in *Hollington v. Hewthorn*, "with its inevitable repetitive proceedings and occasional injustice." He does not agree that evidence of a conviction is irrelevant, as being merely opinion, in a subsequent civil case, and regards the rule of exclusion as a rule of policy excluding a fact which, according to logical processes of reasoning, is of evidential value in the later case. There does, indeed, appear to be something wrong in treating the judgment of a criminal court as equivalent to an expression of opinion only. And it cannot be said that evidence of a conviction must always be valueless in subsequent civil proceedings.

There is no doubt of the inconvenience, from the point of view of courts of law and, what is more important, of the public in general, of requiring two trials to settle what is, if not one question, at any rate questions which are closely related to one another. The best remedy would seem to lie in combining the civil and criminal proceedings instead of substituting for the present rule another which would bring with it different and perhaps greater disadvantages. This is already the practice in some countries, *e.g.*, France, and the suggestion has been put forward by Lord Cooper that we might consider making it possible here for the victim of a traffic or industrial accident to be joined as a party to criminal proceedings arising out of it. There are, no doubt, some objections that might be raised to such a reform. In the first place, an almost complete separation exists between civil and criminal courts and procedure. To confer on a criminal court the function of assessing civil liability and fixing damages would be a heavy burden for it. At least in England, where summary criminal prosecutions are commonly brought before benches of magistrates, the criminal court might be ill-qualified to undertake the determination of the sometimes complicated and difficult questions that might be put to it. It is obvious that what may from a criminal point of view be a very minor offence can involve enormous civil liabilities. It may be thought strange that the English are content, if they are content, to leave the decision

in criminal cases to the extent they do to lay justices. But it is not easy to imagine even in England magistrates being allowed to adjudicate on claims for damages amounting to thousands or hundreds of thousands of pounds. There would probably have to be special courts set up to deal with criminal cases where civil claims were conjoined. The problem would not be so serious in Scotland, since summary criminal cases are tried in the Sheriff Court, which also deals with civil actions without limit of value. But here, too, there would be difficulties. The criminal trial would be delayed and perhaps confused if it were held up until the possibly intricate and numerous inquiries and preparations necessary for the civil action were completed. In most instances it is likely that the criminal aspect of the case would be treated as ancillary to the civil claim or altogether submerged under it, with consequences for the administration of the criminal law that might be unfortunate. Again, the different procedure in civil and criminal trials might create a difficulty where, for example, the accused exercises his right not to give evidence. Perhaps the court might arrive, first, at a verdict in the criminal case and then proceed to hear additional evidence in the civil action.

It would surely be a mistake to dismiss the suggestion as impracticable because a procedural innovation of some magnitude would be required. Could it not be tried out on a fairly small scale? Any person who suffers loss as a result of an accident might in certain defined circumstances be allowed to put forward a claim for damages against the party who has caused the loss or his employer at the trial of that party on a criminal charge, the claim being restricted to a limited figure, say, £500. The claimant would have the option of bringing a separate civil action instead, but if he did so, he would become liable to be penalised in expenses. In the case of a criminal charge sufficiently serious to be tried on indictment the jury might be required, after coming to their verdict, to fix the damages, if any, payable by the accused or his employer to a civil claimant. If it is seriously desired, which one is sometimes inclined to doubt, to simplify and rationalise legal procedure, one of the most profitable lines of inquiry would be a consideration of the means by which a duplication of civil and criminal proceedings might be avoided.

The *Modern Law Review* for May, 1955, also prints a luminous and interesting lecture delivered by Mr. G. S. A. Wheatcroft, a Master of the Supreme Court, at the London School of Economics and Political Science on the subject of **TAX AVOIDANCE** tax avoidance, a subject which, as he says, has so far received little attention except in a very restricted circle, and which, we might add, deserves a good deal of attention. Why has it not received it? Perhaps it shows a suspicious nature to suggest that the subject is one that many people prefer to leave in obscurity, either because it is not to their interest to shed too much light on it or because their consciences are not quite clear. However much we dislike paying taxes we are compelled to agree with Mr. Wheatcroft that tax avoidance is undesirable in the public interest and should be discouraged by Parliament. Apart from the loss of revenue involved, there is a large hidden loss to the

envisaged by the committee, or by fear of losing a child which is already in their care as a result of the examination?

The committee's insistence on the need for medical examination of proposed adopters is based on the view that in the past the tendency has been to pay far more attention to the health of the child than to the health of the adopters. In their opinion the emphasis should be reversed. "The primary object at which all should aim in the arrangement of adoptions is the welfare of the child, and adoption should therefore be approached as a means of finding the right home for a child rather than of satisfying would-be adopters." This sentence, as Miss Stone remarks approvingly, is the *leitmotiv* of the Report, and the situation in which potential adopters far outnumber available children makes it "practically expedient as well as morally right" according to her to treat as the paramount consideration the welfare of children rather than the interests and demands of adults. Practically expedient perhaps, but morally right? Though such an attitude probably represents the ideas of the great majority of persons and bodies concerned with arranging adoptions, the question may be asked whether it is not totally mistaken. The process of adoption vitally affects three parties, the natural parents, the child, and the adoptive parents. Why should the interests of one of the parties be considered as paramount, except on the rather sentimental view that the interests of a child must in every circumstance and on every occasion be preferred to those of an adult? No doubt when it is a matter of awarding the custody of a child to one or other of its parents in cases of divorce or separation, the claims of the child should come first. But quite different considerations apply then. The child is the wronged party. On the other hand, the adopted child stands to gain more and lose less than either the natural or adoptive parents. For a mother to give up her child irrevocably, even if she is unwilling to keep it, must be painful. The adoptive parents assume a heavy responsibility in any event, and run a serious risk by accepting a child of whose heredity they are usually entirely ignorant. The adopted child, who is almost always both unwanted and illegitimate, gains incalculably. Instead of the dreary prospect of an orphanage, or at best of being handed over to foster parents till he is fit to go to work, he is taken into a home which morally and materially is far superior to that which his birth gives him the right to expect, and where the greatest danger he faces is of being spoilt by adoptive parents over-anxious to make their experiment a success. The committee refer feelingly to instances where a mother has been induced to part with her child to people who are "grossly unsuitable" to care for it, and to "deplorable cases" in which a doctor acts as a third party for the benefit of one of his patients, whose neurotic condition he seeks to remedy, or whose marriage he hopes to stabilise, by introducing an adopted child into the home. One wonders whether it is necessarily wrong to give primary consideration sometimes to the needs of a childless couple, and whether, even if the home is not the best available for a child, it may not be a great deal better from the point of view of the child than not to be adopted at all.

It is, of course, right that where a child is placed with a view to adoption by a body like a local authority or an adoption society,

inquiry should be made to ensure that the home to which it is being sent is satisfactory. And no doubt preference should, at least normally, be given to adoptive parents who are of the proper age and of good health, and appear to be of the right type to bring up a child well. Owing to the excess of demand over supply, there is not much room for fear on this score. Still less is there any ground whatever nowadays for a suspicion of baby-farming or of any abuse of adoption for some ulterior purpose. What exactly do the committee mean when they speak of people who are "grossly unsuitable" to care for a child? Perhaps there are some would-be adopters who are temperamentally unfitted to bring up a child wisely. So are a number of natural parents. But nobody suggests taking their children away from them on that account. If a married couple desire so much to have a child not their own that they are willing to assume the burden of adopting it, then there are at least *prima facie* grounds for considering them suitable, and it would be unfair to deprive them of their chance of doing so in the absence of good reason. The committee emphasise the view that no ground exists why a child who is not completely healthy in every way should not be adopted, so long as the adopters are told of the handicap, and they express the opinion that almost any child is "adoptable," or can become so. They are apparently far from accepting the converse view that almost every married couple are capable of parenthood, or might become so.

As the committee point out, the crucial stage in the process of adoption is the placing of the child, which must be effected at least three months before an adoption order is made. It is one thing for prospective adopters to be medically examined before the child is placed. It is another thing altogether to require the prospective adopters, when they already have had a child in their care for months and perhaps years, to pass a medical examination before they are allowed to proceed to the final step. The committee recognise that recent advances in medical knowledge show how quickly babies "grow roots." In the child's interest, therefore, great caution ought to be exercised in removing it from a home where it has settled down. As we might expect, the committee pay no attention to the roots grown by prospective adopters. Is it sensible, or humane, or desirable from anyone's point of view, that adoption of a child already placed should be refused because, let us say, one of the proposed adoptive parents is deaf or has a weak heart, although the child has thoroughly settled down in its new home and only a legal formality is needed to regularise its position? The bad health of its natural parents may cause a child disadvantage throughout its life, just as the natural parents may suffer by a handicapped child. That is one of the misfortunes which afflict human beings. But the adopted child is to be put by the committee in a privileged position. Not only is careful inquiry, so far as possible, to be made before it is placed with a view to adoption, but after it has been adopted *de facto* its new parents are, so to speak, to be placed on trial and compelled to exculpate themselves before the adoption is legalised. They are indeed already required to submit to investigation as to their suitability by a curator *ad litem* appointed by the court. If the committee's recommendations are accepted they will have to undergo a medical examination as well, in which a neutral doctor will not only inquire into their

envisaged by the committee, or by fear of losing a child which is already in their care as a result of the examination?

The committee's insistence on the need for medical examination of proposed adopters is based on the view that in the past the tendency has been to pay far more attention to the health of the child than to the health of the adopters. In their opinion the emphasis should be reversed. "The primary object at which all should aim in the arrangement of adoptions is the welfare of the child, and adoption should therefore be approached as a means of finding the right home for a child rather than of satisfying would-be adopters." This sentence, as Miss Stone remarks approvingly, is the *leitmotiv* of the Report, and the situation in which potential adopters far outnumber available children makes it "practically expedient as well as morally right" according to her to treat as the paramount consideration the welfare of children rather than the interests and demands of adults. Practically expedient perhaps, but morally right? Though such an attitude probably represents the ideas of the great majority of persons and bodies concerned with arranging adoptions, the question may be asked whether it is not totally mistaken. The process of adoption vitally affects three parties, the natural parents, the child, and the adoptive parents. Why should the interests of one of the parties be considered as paramount, except on the rather sentimental view that the interests of a child must in every circumstance and on every occasion be preferred to those of an adult? No doubt when it is a matter of awarding the custody of a child to one or other of its parents in cases of divorce or separation, the claims of the child should come first. But quite different considerations apply then. The child is the wronged party. On the other hand, the adopted child stands to gain more and lose less than either the natural or adoptive parents. For a mother to give up her child irrevocably, even if she is unwilling to keep it, must be painful. The adoptive parents assume a heavy responsibility in any event, and run a serious risk by accepting a child of whose heredity they are usually entirely ignorant. The adopted child, who is almost always both unwanted and illegitimate, gains incalculably. Instead of the dreary prospect of an orphanage, or at best of being handed over to foster parents till he is fit to go to work, he is taken into a home which morally and materially is far superior to that which his birth gives him the right to expect, and where the greatest danger he faces is of being spoilt by adoptive parents over-anxious to make their experiment a success. The committee refer feelingly to instances where a mother has been induced to part with her child to people who are "grossly unsuitable" to care for it, and to "deplorable cases" in which a doctor acts as a third party for the benefit of one of his patients, whose neurotic condition he seeks to remedy, or whose marriage he hopes to stabilise, by introducing an adopted child into the home. One wonders whether it is necessarily wrong to give primary consideration sometimes to the needs of a childless couple, and whether, even if the home is not the best available for a child, it may not be a great deal better from the point of view of the child than not to be adopted at all.

It is, of course, right that where a child is placed with a view to adoption by a body like a local authority or an adoption society,

inquiry should be made to ensure that the home to which it is being sent is satisfactory. And no doubt preference should, at least normally, be given to adoptive parents who are of the proper age and of good health, and appear to be of the right type to bring up a child well. Owing to the excess of demand over supply, there is not much room for fear on this score. Still less is there any ground whatever nowadays for a suspicion of baby-farming or of any abuse of adoption for some ulterior purpose. What exactly do the committee mean when they speak of people who are "grossly unsuitable" to care for a child? Perhaps there are some would-be adopters who are temperamentally unfitted to bring up a child wisely. So are a number of natural parents. But nobody suggests taking their children away from them on that account. If a married couple desire so much to have a child not their own that they are willing to assume the burden of adopting it, then there are at least *prima facie* grounds for considering them suitable, and it would be unfair to deprive them of their chance of doing so in the absence of good reason. The committee emphasise the view that no ground exists why a child who is not completely healthy in every way should not be adopted, so long as the adopters are told of the handicap, and they express the opinion that almost any child is "adoptable," or can become so. They are apparently far from accepting the converse view that almost every married couple are capable of parenthood, or might become so.

As the committee point out, the crucial stage in the process of adoption is the placing of the child, which must be effected at least three months before an adoption order is made. It is one thing for prospective adopters to be medically examined before the child is placed. It is another thing altogether to require the prospective adopters, when they already have had a child in their care for months and perhaps years, to pass a medical examination before they are allowed to proceed to the final step. The committee recognise that recent advances in medical knowledge show how quickly babies "grow roots." In the child's interest, therefore, great caution ought to be exercised in removing it from a home where it has settled down. As we might expect, the committee pay no attention to the roots grown by prospective adopters. Is it sensible, or humane, or desirable from anyone's point of view, that adoption of a child already placed should be refused because, let us say, one of the proposed adoptive parents is deaf or has a weak heart, although the child has thoroughly settled down in its new home and only a legal formality is needed to regularise its position? The bad health of its natural parents may cause a child disadvantage throughout its life, just as the natural parents may suffer by a handicapped child. That is one of the misfortunes which afflict human beings. But the adopted child is to be put by the committee in a privileged position. Not only is careful inquiry, so far as possible, to be made before it is placed with a view to adoption, but after it has been adopted *de facto* its new parents are, so to speak, to be placed on trial and compelled to exculpate themselves before the adoption is legalised. They are indeed already required to submit to investigation as to their suitability by a curator *ad litem* appointed by the court. If the committee's recommendations are accepted they will have to undergo a medical examination as well, in which a neutral doctor will not only inquire into their

medical history and put them through a detailed physical examination, but also give his opinion on their mental and emotional stability and psychological suitability to adopt a child. Is an ordinary medical practitioner qualified to give an opinion on these matters, and why do the committee not go a little further, and suggest additional examination by a trained psychologist? When we consider the new obstacles which the committee suggest putting in the way of legal adoption, and their further recommendation designed to give the court power, where adoption is refused, to take a child which has been *de facto* adopted away from the home where it has settled down, we can hardly help concluding that the proposals made by the committee are well calculated to dissuade people from making application to have a *de facto* adoption legalised, and so to undo quite a considerable amount of the good done by successive Adoption Acts during the last quarter of a century.

Emphasis is laid by the committee on the need to appoint an independent curator *ad litem* to report on adoption proceedings, and they condemn the practice of some local authorities in accepting appointment in cases in arranging which they have themselves participated. They recommend that where a local authority in England is responsible for placing a child no officer of that authority shall act as curator *ad litem*. They go on to state that in principle the same provision should apply to Scotland, but that they understand this would be impracticable at present. One would like to know what grounds they have for expressing this view. It may be the practice in some parts of Scotland to appoint an officer of a local authority, but it is certainly not universal, and it is difficult to see why the appointment of a curator unconnected with any local authority should be impracticable. Nor, though the committee are right in emphasising the importance of a independent curator, do they seem to go far enough. Where the local authority is not concerned in placing the child, its officers have the duty of supervising the home during the probationary period before application to the court, and, while it is desirable that the curator should consult with the supervisory authority, it does not seem consistent with the complete independence of the curator that he should be the same person as the officer charged with supervisory duties. The curator's responsibility should be to the court alone. It may also be questioned whether the committee are justified in deprecating, as they do, the choice as curator of persons who are not trained social workers. It does not appear to be necessary that the curator should be specially qualified for the work, so long as he is competent and experienced. A solicitor or clergyman, for example, who regularly acts as curator may be at least as likely to take a balanced and responsible view of his duties as a social worker. The curator is only appointed after the application for an adoption order has been lodged and it is unrealistic to suppose that he will be able, however well qualified, to go deeply into such a matter as the emotional relationship between the child and the adopters. Here again the bias of the committee causes them to misapprehend the functions of the curator. He ought not to be regarded as a sort of special investigator employed to search out all the secrets of the prospective adopters. If at the end of the probationary period, which is no doubt a useful requirement in their

interests as well as those of the child, they are prepared to proceed to legal adoption, then, provided the necessary precautions have been taken with regard to their respectability and the adequacy of the home they offer, and also with regard to consents by the natural parents and so on, it is only in very exceptional circumstances surely that a court should refuse to make the order. It is for the court to consider the would-be adopters equally with the child, and not to disappoint them because some social worker with perhaps more zeal than discretion thinks that they have not all the good qualities that ideal parents should possess.

It would be unfair to give the impression that the report of the committee is solely concerned with proposals designed to put difficulties in the way of would-be adopters. Most of their recommendations are useful and practical, and some would simplify the process of adoption. Nor would it be right to criticise the committee for giving attention to the interests of adopted children, provided it is not at the expense of the other parties involved. One point on which they lay a great deal of stress, probably with good reason, is on the need for the adoptive parents to tell the child at as early an age as possible that he has been adopted rather than let him find out for himself when he is an adolescent, with possibly disastrous psychological results. Another matter dealt with is that of giving the adopted child the same rights as regards inheritance from his adoptive parents as a natural-born child enjoys from his parents. The Adoption of Children Act, 1949, in the main effected this so far as England is concerned and the committee recommend legislation to remove an existing anomaly. In Scotland, however, it is a very serious defect in adoption law at present that an adopted child is still treated for purposes of succession as the child of its natural parents, a right which is valueless, instead of the child of its adoptive parents. The committee "share wholeheartedly the view of the great majority of Scottish witnesses" that the law should be altered and brought into line with English law on the subject, and they hope that the alteration will soon be brought about, by *ad hoc* legislation if necessary. But they refrain from including a specific recommendation to this effect, presumably because the alteration has already been recommended by the Mackintosh Committee on the Law of Succession. The omission is a pity, since it may prejudice the making of this important and urgent reform, and the fact that another committee has already reported in favour of it does not seem to be a valid reason for leaving it out.

Periodicals also received: *Revista del Foro* (Lima); *The Canadian Bar Review*; *La Justicia* (Mexico); *The Western Political Quarterly*; *Oklahoma Law Review*; *The Law Quarterly Review*; *The American Journal of International Law*; *Revista Jurídica de la Universidad de Puerto Rico*; *Documentation Juridique Étrangère* (Brussels); *Jus* (Milan); *The International and Comparative Law Quarterly*; *New York University Law Review*; *Connecticut Bar Journal*; *Textes Législatifs Étrangers* (Brussels); *Revue Internationale de Droit Comparé*; *The British Journal of Administrative Law*.

RECENT LITERATURE

The Law of Reparation in Scotland. By the late A. T. Glegg, Advocate. Fourth edition, by the late J. Lindsay Duncan, Advocate, Sheriff-Substitute of The Lothians and Peebles at Edinburgh. 1955. Edinburgh: W. Green & Son, Ltd. £4 10s. net.

The publishers of a fourth edition of this important work are to be congratulated upon its appearance after an interval of time which, in the difficult circumstances in which law publishing is carried on in Scotland, must be deemed commendably short. The pleasure with which this work is sure to be greeted will be tempered with regret that the very learned editor, Sheriff Duncan, has not lived to see the fourth edition in print. His death at a comparatively early age robs Scottish legal scholarship of a man who had already proved himself and from whom much important work might yet have been expected. It is at least gratifying to record that, as the publishers say, the text of the new edition appears in the form in which Sheriff Duncan left it and without further revision, a few footnotes apart.

In this edition it was necessary to take account of some major and many minor changes in the law. Thus since 1939 there has been important legislation relating to common employment, contributory negligence, insurance against the risk of industrial injury, remedies against the Crown, and the law of defamation; whilst the body of case law has been as full as ever.

These various topics have been adequately treated. It is in our opinion noteworthy that (as the publishers indeed indicate) there is evident a reluctance to crowd the pages with English references. There is in the field of reparation so large a body of Scottish case law that reliance upon English decisions is now less necessary than formerly while its dangers have often been emphasised. Thus on p. 20 the learned editor makes it very plain that even if *Rylands v. Fletcher* would have been decided in Scotland as it was in England it would have been so for a different reason. It is high time that this was more generally recognised.

The editor, in dealing with the law of contributory negligence, has rightly and indeed inevitably left standing many of the old decisions, since "consideration of whether or not acts of negligence constitute contributory negligence are still relevant inasmuch as acts of negligence which at common law would not have been deemed contributory would not appear to be affected by the Statute" (p. 46). In other words an act must be appropriately called negligence before it can constitute contributory negligence. The new law embodied in the Crown Proceedings Act, 1947, is dealt with in Chapter 4, and perhaps in view of a right proportion to be observed as amongst the various sub-headings of that chapter sufficient attention has been paid to it in a work not purporting to deal with constitutional law. But the reader would have been interested in the learned editor's

view of *MacCormick v. Lord Advocate* and in particular of the effect of the ouster of the remedy by way of interdict against the Crown in section 21 of the Act.

In Chapter 16, entitled Liability of Owners of Works, the reader will find a very full treatment of the difficult questions so frequently arising today out of the duties of employers and the security which they are bound to provide in the matter of fencing and the like.

The format of the book, which is in line with the other modern publications of this house, is extremely pleasant and it is convenient to handle. A table of statutes, something of an innovation in Scotland, makes a welcome appearance and will, it is to be hoped, become an essential feature of all new publications.

With this new edition and Professor Walker's work on *Damages* the practitioner will have no cause to complain of the help afforded him by the text-writer in the field of reparation. The fourth edition of Glegg on *Reparation* is an excellent piece of work.

A. D. GIBB.

Perjury Unlimited. A monograph on Nuremberg. By Andrew Dewar Gibb, q.c., Professor of Law in the University of Glasgow. 1954. Edinburgh: W. Green & Son, Ltd. 3s. 6d. net.

A perusal of Professor Dewar Gibb's monograph on Nuremberg cannot be commended to those who prefer to bury uncomfortable memories or to draw a curtain across the past. Like the recent writings of Lord Russell of Liverpool, *Perjury Unlimited* is embarrassing. In the year of its publication, the Western Powers were concerned to re-create a German army: before this review appears the great majority of the inhabitants of the Saar will have asserted their repudiation of a future separated from Germany; old songs, old slogans and old hatreds have been revived. But in Britain a generation has grown up which knew not Hitler, and for whom the agonies and uncertainties of the war years mean nothing. Belsen, Dachau, Struthof Natzweiler—what are their names now to those who pass by? There are still concentration camps where men suffer, slave and die. What satisfaction, therefore, to reflect on the price paid in human lives to war down the cruel and selfish dominion of evil men in Germany? And, should the subject be raised, one can always recall Hiroshima, Nagasaki and the mass graves of the Katyn Forest to trouble the conscience of the former accusers at Nuremberg.

Professor Dewar Gibb's monograph is, as it were, his notes and reflections on one aspect of the Nuremberg Trials which has received little attention from legal writers hitherto. He is not much concerned with the legal basis of the trials nor with the details of the charges; his concern is with the tortuous efforts of the accused to justify themselves, and to frustrate if possible the task of prosecuting counsel and of the Court to bring home to the guilty the full measure of their responsibility. The analysis is often ironic or polemic in discussing the accused, and impatient in dealing with some of the prosecutors when their cross-examination failed to check irrelevancy and impertinence

or to probe ruthlessly to the roots of the evils recorded in the indictment. The constant elements in the testimony of the accused are lying and prevarication. The leaders of the régime—those who had access to fullest information regarding administration and policy—in succession naively disowned personal knowledge of the most notorious horrors, such as the concentration camps. When pressed with crimes which they could not otherwise disown, the defendants who had held high command in the armed forces sought to exculpate themselves either by throwing the blame on the deceased Hitler as Führer, or on irresponsible subordinates. Few expressed any regrets—and this point has been rightly stressed by the author (p. 26). “The careful reader may well be struck by the lack of feeling shewn by the accused for the innocent people who suffered as a result of the régime. Denial of personal responsibility was perfectly consistent with concern and sorrow at the fate of the millions of helpless men, women and children infamously sacrificed to the monster of National Socialism. But of this there is very little to be discerned in the record of the evidence.” One aspect of the evidence, it seems to the reviewer, could possibly have been stressed even more forcibly, namely the craving of certain of the accused for the limelight. The desire to strut the stage of history for the last time as Wagnerian heroes seems to have been strong in those defendants who kept their nerve. Even the unbalanced Hess was jolted from his amnesia by the realisation that he might lose the opportunity to make a public demonstration in the witness-box.

The voluminous record of the Nuremberg Trials has probably been studied by few Scottish lawyers. The reviewer agrees with the author of *Perjury Unlimited* that the Americanised terminology is somewhat distracting to the British lawyer. Some of the translated evidence, particularly of abstract concepts, tends to be rendered in laborious English which has a foreign ring. The record which was made for history of the infamy of the leaders of the Reich is, however, stark enough to shine through pedestrian translation, and the President's English is perhaps entitled to equal respect with the Queen's. Professor Dewar Gibb's commentary on the mendacity of the defendants serves the very valuable purpose of exposing them as despicable men under the scrutiny of Truth. Their monstrous crimes were amply proved—yet none was prepared to go to his account, attempting to justify the Satanic morality by which, for example, the Nazi régime had been inspired to liquidate millions of human beings in the concentration camps. By their perjury at Nuremberg the defendants in effect admitted the guilt of that monstrous régime.

Professor Dewar Gibb's book will not appeal to those who wish to forget. To those who pause to question what manner of men these were who, having exploited appeasement to the limit, led the world into war in 1939, *Perjury Unlimited* may be warmly recommended. Had the issue of the late war been different, and had such men as Churchill and Alexander faced a court of German judges on a trumped-up accusation, one can feel certain that they would not have betrayed the faith by which they lived through the implied recantation of tortuous and unlimited perjury.

T. B. SMITH.

The Legal Mind : An Approach to the Dynamics of Advocacy. By Gerald Abrahams, Barrister-at-Law. 1954. London: H.F.L. (Publishers) Ltd. 18s. net.

Professional Conduct and Advocacy. By K. V. Krishnaswami Aiyar, Advocate of the High Court, Madras. Third edition. 1953. Bombay: Oxford University Press (Indian Branch). Rs. 7.8.

These two books attack in different ways the problem of the conduct of legal proceedings. Mr. Abrahams has essayed the self-contradictory task of trying to analyse and illustrate for both lawyers and laymen how an advocate thinks out and presents a case. Being aimed at both classes of reader the book falls between two stools and will probably satisfy neither. For lawyers it contains a great deal of sound sense and useful analysis of the practical conduct of cases and of how the legal mind argues and distinguishes, but at the same time it is too much cluttered with background matter which every lawyer should already know, such as distinctions between contract and tort, trespass and negligence, the need to be wary in alleging fraud, and so on. Lawyers will, too, be irritated by the inaccurate, incomplete and unsystematic case-references, which ignore the customary conventions as to bracketing and abbreviations and regularly omit page or volume number. In so far as this book is designed for lawyers, references (which are quite frequent, and up to date) should be of textbook standard. Moreover the author has a positively Teutonic mania for capital letters. Despite its merits, of which the greatest is probably the repeated insistence on attention to evidence, its production and elucidation and the rules attendant thereon, for the legal reader the book is inferior to Munkman's *Technique of Advocacy*.

It is possible that laymen will find the book more enlightening though there are many passages where the legal knowledge given them is too compressed to be fully comprehensible and the lay reader might well be left with a farrago of incomplete bits of law as a background to a description of what may or may not be done in court and what is good or bad tactics. The book should have been aimed at one class of reader or the other. In aiming at both targets, the author has hit neither.

The second book is based on a series of lectures delivered to apprentices-at-law by an experienced Indian lawyer under the auspices of the Madras Bar Council and deals with studying law, working up a case, pleading, examining witnesses and many aspects of professional conduct and ethics. When allowance is made for certain specialities applicable to Indian practice it is significant how universal the problems of legal practice are: the author can draw on Forsyth's *Hortensius*, Parry's *Seven Lamps of Advocacy*, and addresses by Lord Macmillan and Lord Clyde. The lectures would be stimulating and of value to the original hearers and even when taken away from their original Indian context there remains a great deal of sound and valuable advice which, if followed, would adequately maintain at a proper level the conduct of legal practice. Instruction in professional conduct is not enough given in this country: the lectures in this book may give a lead to some of our legal societies.

DAVID M. WALKER.

The Province of Jurisprudence Determined: The Uses of the Study of Jurisprudence. By John Austin. With an introduction by H. L. A. Hart, Professor of Jurisprudence in the University of Oxford. The Library of Ideas. 1954. London: Weidenfeld and Nicholson Ltd. 12s. 6d. net.

The Province is a classic, however much its thought may have been criticised and however much Austinian jurisprudence may be out of favour. For that reason serious students of legal theory will continue to want (and to have) to read Austin. It is accordingly satisfactory and valuable to have the six lectures which comprise the *Province* again available at a reasonable price and in attractive format and good print. This edition also contains the rather less known essay *On the Uses of the Study of Jurisprudence*. The volume is the first in a new series entitled The Library of Ideas designed to make available in cheap editions significant works in the history of Western thought and ideas, and it is to be hoped that other works of jurisprudential interest will subsequently appear.

Professor Hart's introduction outlines Austin's career and the salient features of his analysis of law, drawing attention to the fact that Austin's analysis would be less faulty if amended by the introduction of the notion of a *rule* and acts in accordance therewith. He also concisely assesses Austin's achievement as being the segregation of legal doctrines from political and philosophical discussions. As the editor observes, Austin's influence on the development of jurisprudence in England has been greater than that of any other writer, and if only for that reason the *Province* will continue to be studied. In Scotland rather more philosophical jurisprudence, represented by Lorimer, Miller, Herkless and Hastie's translations of Kant, has made little permanent impression so that in Scotland too modern jurisprudence is largely analytical, derived eventually from Austin and his school, while Austin remains probably the most satisfactory original text which can be put in the hands of students of jurisprudence.

DAVID M. WALKER.

Three Great Systems of Jurisprudence. By K. Kahana Kagan, M.LITT.(CANTAB.), Lecturer in Codes, Jews' College, London. With a foreword by Professor Harold Greville Hanbury, D.C.L. 1955. London: Stevens & Sons, Ltd. 25s. net.

In his foreword to this book the Vinerian Professor remarks truly that it is "in the growing recognition of the value of comparative law that the most hopeful sign in the trend of modern legal education may be sought." The promise of this book, of a comparative study of Jewish, Roman and English legal systems, is novel and exciting, for lawyers commonly know far too little of Jewish law and this is not any less so in a country where indictments for a certain offence still specify the contrariety of the acts charged to the precepts of the Book of Leviticus. So little is known of Jewish law among legal scholars that one had in prospect a most fascinating study. It is hard for a reviewer who is a lawyer and not a Jew to consider how this study would appeal

to a reader who was a Jew and not a lawyer, but he can only record his own impressions, and it must be confessed that the book on reading did not live up to the promise of its title or preliminary indications of its scope and character. The work was written, we are told, (p. 190) "for the purpose of bringing forward new ideas and material for the study of jurisprudence in general. From the comparative aspect it is hoped that by contrasting the three systems it will be possible to arrive at a better valuation of the principles of each respective system and to understand it more clearly." This purpose does not appear to have been achieved. There seem to be few new ideas and very little new material, while there has not been really very much true comparison of the three systems.

The form of the work is quite unlike, say, Lawson's *Negligence in the Civil Law* in that there are no citations of parallel passages from the systems under review, and indeed far too little reference to primary sources at all. Serious work on comparative law cannot be done by the recital of the views of commentators alone. Furthermore, the author has so confined himself to the three systems of law under discussion as to ignore completely the existence of other systems which might have merited footnote mention in the various connections; thus, for example, he contrasts the dualism of Roman and English law with the monism of Jewish law in apparent ignorance of the fact that there are other systems which are not troubled by the distinctness of legal and equitable jurisdictions; Jewish law is not unique in this. There is an initial chapter on the value of comparative law which seems to say nothing new, and then a chapter on Jewish law on the one hand and Roman and English law on the other hand. Most of this is devoted to an explanation on the usual lines and citing the usual authorities of the fact that Roman and English law were both in different ways dualistic systems. Very little is said about Jewish law at all, and what there is so vague and generalised, without detail or references or examples, as to convey to the non-Jew no real understanding of the different approach of Jewish law. It is hard to say how a Jew might appreciate this, but the exposition of the reasons for the development of the equity jurisdiction or for the rise of the trust concept seems, with all respect, to add nothing to what is already known by every student of comparative law and jurisprudence.

The following chapter deals with Jewish law and Roman law. It seems a mistake to try to compare Jewish law with the other systems separately rather than to consider topics of all three at the same time. In this chapter again most of the space is devoted to matter well-known to law students and there are sections, such as those on natural law and on the praetorship, which do not appear to elicit any comparisons at all. There are, however, more statements here of the attitude of Jewish law so that some comparisons do appear.

The fourth and longest chapter is similarly devoted to a comparison of Jewish law and English law. The discussion fluctuates in the most surprising and abrupt manner from such topics as the relationship of law to other branches of knowledge and the theory of the social contract to the nature of rights *in rem* and *in personam* and uses and trusts and then back to discussion of the terms "law" and "right." No coherent plan of comparative treatment is evident

and the comparisons drawn do not appear to represent anything novel, apart possibly from the not altogether new contention that the social contract had its source in Hebrew law, a contention based on Biblical references to compacts between God and His people: the present reviewer doubts if they belong to the same universe of discourse at all. It is not, however, at all clear why the social contract should be taken as representing English law: that it has connection with English law is true enough but it is primarily a matter of legal and political theory. It really seems that the learned author has not made up his mind whether he is trying to write a comparative study of jurisprudential concepts, and in particular equity, or a comparative study of three legal systems. It does not appear that he has succeeded in doing either. His purpose was apparently (p. 8) "to examine the principles which underlie the laws of the Romans, English and Jews" but nothing very clear seems to emerge.

The style of presentation is too frequently marred by paragraphs containing a series of rather trite quotations from standard authorities when the substance of the point could have been expressed more concisely and pithily in a couple of sentences with a footnote reference to the authorities. Thus, *e.g.*, on pp. 47-8 successive paragraphs begin: "Professor de Zulueta maintains . . ." "Professor de Zulueta says further . . ." "Professor Friedmann states . . ." "Dr. Paton remarks . . ." It appears from the legal angle that the learned author is, with all respect, not really sufficiently familiar with comparative jurisprudence and with Roman and English law to have essayed a comparative study of the three systems. A more detailed comparison in respect of one or two particular aspects, disclosing underlying similarities and differences would have been more profitable than this vague and, it must be confessed, unenlightening discourse.

DAVID M. WALKER.

Winfield on Tort. Sixth edition. By T. Ellis Lewis, B.A., LL.B., PH.D., Lecturer in Law in the University of Cambridge. 1954. London: Sweet & Maxwell Ltd. £2 10s. net.

A new edition of *Winfield on Tort* needs no commendation, for previous editions have already established this textbook as a classic and proved its utility both for the student and for the practitioner. As the last edition was published in 1950 a new one was overdue. It is a sobering thought that the sole Scottish textbook on *Tort* is only just available in a new edition after a gap of fifteen years—the last edition being contemporaneous with the first edition of *Winfield*. The new edition of *Winfield* is noteworthy for being the first to be published after the author's death. Naturally that would elevate it to the rank of being a recognised authority. But British courts now seem to be tending towards the recognition of the works of living textbook writers as continental courts do and as was once the fashion of the Court of Session. At any rate *Winfield on Tort* seems to have been so recognised for many years, as it was cited with approval in court long before the death of its learned author.

The editorship of the present edition is in safe hands. Doctor

Lewis was Sir Percy Winfield's law pupil, took over his lectureship at Cambridge when he retired in 1947 and was in 1950 entrusted by Sir Percy with the responsibility for the first edition to be published after his death—little realising that the task would fall to his lot so soon. Owing to the incessant output of the courts the new edition has had to include some one hundred additional pages and since 1950 it has been found necessary to make additions or alterations on the following topics: *volenti non fit injuria*, the State and its subordinates, master and servant, contribution among joint tortfeasors, death, defamation, licences, negligence, conspiracy, dangerous land and structures, interference with contract and the Limitation Acts.

The textbook, under its new editorship, should continue to commend itself to all Scots lawyers provided the distinctive Scots principles of *dolus* and *culpa* are kept in mind.

W. A. ELLIOTT.

Clerk & Lindsell on Torts. Eleventh edition. Edited by A. L. Armitage, M.A., LL.B., G. Ellenbogen, M.A., His Honour Judge Charlesworth, LL.D., T. A. Blanco White, B.A. Under the general editorship of John Burke, Barrister-at-Law, and Peter Allsop. 1954. London: Sweet & Maxwell Ltd. £4 15s. net.

This new edition of Clerk & Lindsell appears within seven years of the previous edition, during which time many important cases have been decided and the Crown Proceedings Act, 1947, the Law Reform (Personal Injuries) Act, 1948, and the Defamation Act, 1952, have passed into law together with certain statutory alterations to the law of patents and industrial designs. The appropriate portions of this standard work have accordingly been rewritten and its length extended to over a thousand pages.

The revision has been performed, like that involved in the previous edition, under the general editorship of John Burke and Peter Allsop, while separate chapters have been revised by four other editors. Scots lawyers will probably value most the chapters on the law of negligence, now edited by His Honour Judge Charlesworth, LL.D., for Charlesworth on *Negligence* is a familiar textbook on this side of the Border. The last edition of that work appeared in 1947: so the appropriate chapters in Clerk & Lindsell may presumably be regarded as the learned editor's most up-to-date views on this changing subject. He has now adopted Professor Winfield's view of negligence as a separate and independent tort but with the law relating to dangerous things, dangerous chattels, and dangerous premises as clearly recognised branches of this independent tort. Of particular interest is his view that in so far as *Bourhill v. Young*, 1942 S.C.(H.L.) 78, 1943 S.L.T. 105, decided that Young owed no duty to the fishwife, it was wrongly decided according to English law. He favours the view recently expressed by Denning L.J. in *King v. Phillips* [1953] 1 Q.B. 429 that *Bourhill* did involve a breach of duty, but where the damages suffered were too remote.

With its wide scope, its detailed consideration of every variety of tort and its copious citation of case law, Clerk & Lindsell is likely to remain the standard textbook for the English practitioner. If one

may venture a criticism it is that conflicting opinions are to be found on different pages, depending on who were the particular editors. But that is perhaps unavoidable where several editors are employed. Your reviewer feels, however, that greater reconciliation might have been achieved between the views expressed by G. Ellenbogen on remoteness of damage and those of Doctor Charlesworth on the same subject but in a different chapter dealing with liability for negligence.

W. A. ELLIOTT.

Bytes on Bills of Exchange. Twenty-first edition. By Maurice Megrah, of Gray's Inn, Barrister-at-Law. 1955. London: Sweet & Maxwell, Ltd. £3 3s. net.

In his introduction to the first edition of his work, written in 1829, the learned author indicated that his design was to give "a plain and brief summary of the principal practical points relating to bills and notes, supported by a reference to the leading or latest authorities," and added, "No pains have been spared to render the subject intelligible." This design, and the sustained effort necessary to achieve it, characterise this, the twenty-first, edition in respect of both the domestic and the international aspects of the subject. With regard to the former, the work is brought up to date in respect of case-law, both Scots and English, modern developments, such as the "opening" of the crossing of cheques, are discussed, and attention is directed to the present investigation into the expediency of dispensing with the endorsing of cheques paid in for collection. With regard to the latter—a matter of ever-increasing importance in these days—American and Dominion law is treated more fully than in previous editions, and there is added a helpful comparative table of the sections of the Negotiable Instruments Law of the United States and the British Bills of Exchange Act, 1882. The well-known chronological order of treatment with which the users of successive editions have become familiar is preserved, but archaic style and language have been replaced by the idiom of the current speech, and adapted to the needs, of a generation in a hurry, e.g., "Of the stamp" becomes "Stamp Duties," and "Of the Legal Remedies for and against Parties to a Bill, Note, or Cheque" becomes simply "Legal Remedies." The various topics dealt with in each chapter are also clearly differentiated by the judicious use of different types of print, and the vast amount of material is made readily accessible by means of page-headings giving the general contents of each page, ample cross-references by page and not by chapter, tables of statutes and cases and a comprehensive index. The print is clear and distinct, and, the paper being of fine quality, the volume is less bulky and more easily handled.

The title of the work has never quite done justice to the extensive range of its contents. In addition to bills, notes and cheques, the instruments dealt with include share and dividend warrants, debentures, bank-notes, bank pass-books and machined statements, deposit receipts, letters of credit, money and postal orders, and travellers' cheques. It seems, indeed, that not one of the instruments,

negotiable or otherwise, so indispensable for the financing of trade and commerce, has been omitted.

Scots lawyers will find most of the aspects of the subject peculiar to our system of law dealt with in their appropriate places, and the effect of the recent decisions of *Nicol's Trs. v. Sutherland*, 1951 S.C. (H.L.) 21; 1951 S.L.T. 201, and *McTaggart v. MacEachern's Judicial Factor*, 1949 S.C. 503; 1949 S.L.T. 363, duly noted. The only additions which, it is suggested, might be made in the next edition are, to the chapter on consideration, a note of the meaning of that term in Scots law, and, to the chapter on limitation of actions, a reference to the sexennial prescription.

It is indeed most satisfactory to have available, after some sixteen years, a new edition of this work which has, for over a century and a quarter, maintained its place as the leading authority on a very important, if somewhat complicated and difficult, branch of the law, and it will be of inestimable service to all who study and practise the law, whether as teachers or students, lawyers or bankers. To bankers especially this edition will be of the greatest value and assistance, inasmuch as its learned editor, in addition to being a member of the legal profession, is secretary to their Institute, and editor of the latest edition of *Paget's Law of Banking*.

DAVID MAXWELL.

The Rent Acts. By R. E. Megarry. Eighth edition. By Ashley Bramall and Paul Baker, Barristers-at-Law. 1955. London: Stevens & Sons Ltd. £2 15s. net.

In turning to the eighth edition of Mr. Megarry's book on the Rent Acts, one wonders whether to feel greater indignation at the state of matters which renders an eighth edition of this book necessary, or admiration of the work done by the learned author in turning out seven editions and now, with some outside aid, an eighth edition. In his entertaining preface Mr. Megarry quotes some of the hard, but by no means too hard, things which have been said about this series of Acts, whose horrors the late Lord Justice McKinnon claimed were prematurely hastening many of the judges to their graves. In these circumstances most of his readers will find it impossible to endorse the dedication of the work to the draftsmen of the Acts with "awe and affection." Surely affection is the last emotion to be felt for them and awe is a word too tinged with respect to be in the least degree appropriate. The whole system of modern legislation stands condemned by the need for an eighth edition of Megarry. Perhaps the presentation to each parliamentary draftsman of a copy of the duodecimo edition of the Scottish pre-Union Statutes might stimulate them to greater lucidity and terseness. It is high time there was a moratorium in legislation about houses in order that an intelligible, if not a brief, consolidating and simplifying statute might be passed so that the legal profession should have time to digest the mass of laws and rules with which it is found necessary to deface the subject.

This is the first occasion on which Mr. Megarry has been unable to spare the time—and who can wonder at it—to edit the book single-handed and the main responsibility for the new edition rests

upon Mr. Bramall and Mr. Baker. Important and testing innovations have had to be dealt with, in particular the Housing Repairs and Rents Act of 1954 and the Landlord and Tenant Act of 1954, the latter of which mercifully does not apply to Scotland. These have been brought into the text with such naturalness and ease as the subject permits, qualities which are an outstanding feature of all Mr. Megarry's work. And, of course, not only statutes but the inevitable statutory instruments following upon them have been duly considered. As far as can be observed the work deals exclusively with the English Housing Repairs Act of 1954, which alone is included in the table of statutes. In general, however, this work is noteworthy for the attention which it pays to Scottish authority. And more remarkable still is the fact that many, if not all, cases decided in the Sheriff Courts are mentioned in the text, so that the Scottish practitioner is in a position to use it with every confidence that it has, if not exhausted, at any rate dealt very fairly with Scottish authority. It would be still more valuable from this point of view if in a future edition a title "Scotland" were to find a place in the index. Amongst books on the Rent Acts Megarry is in a class by itself and this latest edition has certainly done nothing to shake that pre-eminence.

A. D. GIBB.

Blundell's Rent Restrictions Cases, Annotated. Third edition. By L. A. Blundell, LL.M., and V. G. Wellings, M.A.(OXON.). With Supplement. 1955. London: Sweet & Maxwell Ltd. £2 10s.

This book in one handy volume provides a comprehensive collection of over 1,200 Rent Restrictions cases. As in previous editions, the scheme is alphabetical but the book is prefaced by a concise digest and followed by an index. There are also detailed annotations and cross-referencing of the cases, and extracts from the more important judgments. The supplement brings the work up to May 27, 1955.

The book accordingly to a great extent performs the functions of a textbook. Its main value and purpose, however, are to enable the practitioner to discover, without having to track down a particular case referred to in a textbook in one of the sixteen different series of reports covered, whether the case is of value to him. This is particularly useful to the Scottish practitioner who cannot without great difficulty obtain access to the more esoteric series of English or Irish reports.

The digest is keyed to the fourth edition of Blundell's *Rent Restrictions Guide*.

The work seems well-checked and free from error (apart from the perpetuation of the reference to "Sessions Cases" which has appeared in the previous editions).

R. A. BENNETT.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Repertory of Practice of United Nations Organs. Volume I. 1955. New York: United Nations. Available from H. M. Stationery Office. Price 25s. net.

Konstam on Income Tax. Cumulative Supplement No. 4 to Twelfth Edition. 1955. London: Stevens & Sons Ltd., and Sweet & Maxwell Ltd. Price 7s. 6d. net.

Mens Rea in Statutory Offences. By J. Ll. J. Edwards, M.A., LL.B., PH.D. Volume VIII. English Studies in Criminal Science. Edited by L. Radzinowicz, LL.D. 1955. London: Macmillan & Co. Ltd. Price £1 1s. net.

The Year Book of World Affairs, 1955. Volume 9. Editors: G. W. Keeton and G. Schwarzenberger. Published under the auspices of The London Institute of World Affairs. 1955. London: Stevens & Sons Ltd. Price £2 2s. net.

Archbold's Criminal Pleading, Evidence and Practice. Sixth Cumulative Supplement to Thirty-Third Edition. Edited by T. R. Fitzwalter Butler, Barrister-at-Law and Marston Garsia, Barrister-at-Law. 1955. London: Sweet & Maxwell Ltd.

Défense des Libertés Démocratiques. Interventions et documents de la Conférence Internationale des Juristes pour la Défense des Libertés Démocratiques (Vienne, 1954). 1954. Bruxelles: L'Association Internationale des Juristes Démocrates. Prix: 50 francs belges ou \$ 1,00.

Constitutional Law. By E. C. S. Wade, M.A., LL.D., and G. G. Phillips, C.B.E., M.A., LL.M. Fifth Edition by E. C. S. Wade. 1955. London: Longmans, Green & Co. Price £1 15s. net.

Clerk & Lindsell on Torts. Supplement to Eleventh Edition. 1955. London: Sweet & Maxwell Ltd. Price 4s. 6d. net.

Chitty on Contracts. 2 Volumes. Supplement to Twenty-first Edition. 1955. London: Sweet & Maxwell Ltd. Price 4s. 6d. net.

Price Discrimination in Selling Gas and Electricity. By R. K. Davidson. The Johns Hopkins University Studies in Historical and Political Science. Series LXXII, No. 1. 1955. Baltimore: The Johns Hopkins Press.

Baron David Hume's Lectures 1786-1822. Edited and annotated by G. Campbell H. Paton, M.A., LL.B., Advocate. Volume IV. 1955. Edinburgh: The Stair Society.

The Proof of Guilt. A Study of the English Criminal Trial. By Glanville Williams, LL.D. Published under the auspices of The Hamlyn Trust. 1955. London: Stevens & Sons Ltd. Price 17s. 6d. net.

Fundamental Rights in India. By Alan Gledhill, M.A., I.C.S.(RETD.). 1955. London: Stevens & Sons Ltd. Price £1 5s. net.

The Union of South Africa. The Development of its Laws and Constitution. By G. W. F. Dold, M.A., B.C.L., LL.B., and C. P. Joubert, B.A., LL.D. Volume 5 of The British Commonwealth. 1955. London: Stevens & Sons Ltd. Price £2 15s. net.

INDEX TO VOLUME LXVII

	PAGE
Anatomy and Pathology of the Constitution, The	1
Contribution of Lord Cooper of Culross to the Law of Scotland, The	249
Conveyancing Propositions	271
Current Periodical Literature	121, 319
English and French Legal Methods	188
Medieval Scottish Executors and the Courts Spiritual	129
Memory Verses of the Romano-Canonical Procedurists	284
Parliamentary Supremacy and the Language of Constitutional Limitation	62
Recent Leading English Cases	108, 223, 305
Recent Leading Scottish Cases	103, 213, 298
Recent Literature: Legal, Historical, General	125, 237, 328
Recent Privy Council Cases	112, 228, 310
Roman Law in the <i>Regiam Majestatem</i>	155
Significance of Military Necessity in the Law of War, The	201
Some Aspects of the Social and Ethical Element in Analytical Jurisprudence	79
Stair the Scientist	23
Universities and Scottish Legal Education, The	26

CONTRIBUTORS TO VOLUME LXVII

	PAGE		PAGE
Anton, A.	129	Marshall, G.	62
Brownlie, A. R.	26	Middleton, K. W. B.	121, 319
Chloros, A. G.	79	Millar, Professor R. W.	284
Cooper of Culross, The Rt.		Mitchell, Professor J. D. B.	1
Hon. Lord	23	Richardson, H. G.	155
Dunbar, N. C. H.	201	Smith, Professor T. B.	249
Elliott, W. A.	108, 223, 305	Walker, Professor D. M.	
Hamson, C. J.	188		103, 213, 298
Henry, Professor G. L. F.	271		

DECIDED CASES COMMENTED ON

Scots Cases are indicated by an asterisk

	PAGE		PAGE
Adler <i>v.</i> Dickson and Another, 1954 . . .	110	*Dobbie <i>v.</i> Dobbie, 1953 .	104
Aladesuru, Samuel, and Others <i>v.</i> The Queen, 1955	313	Flowers <i>v.</i> George Wimpey & Co., Ltd., 1955 . . .	309
Associated Broadcasting Co. Ltd. and Others <i>v.</i> Com- posers, Authors and Pub- lishers Association of Canada, Ltd., 1954 . .	117	*Fox <i>v.</i> Glasgow South- Western Hospitals Board and Another, 1955 . . .	303
Att.-Gen. for New South Wales <i>v.</i> Perpetual Trustee Co., Ltd., and Others, 1955	228	*Glasgow Corporation <i>v.</i> Central Land Board, 1955	217
Baker <i>v.</i> National Trust Co., Ltd., and Others, 1955	234	*Graham <i>v.</i> Robert Younger Ltd., 1955	298
Bates <i>v.</i> Stone Parish Council, 1954	110	*Hewitt <i>v.</i> West's Gas Improvement Co., 1955 .	214
Bevan <i>v.</i> Bevan, 1955 . .	224	*Hunter <i>v.</i> Hanley, 1955 .	220
Bocock <i>v.</i> Enfield Rolling Mills, Ltd., 1954 . . .	109	*Hynd's Executor <i>v.</i> Hynd's Trustees, 1955 .	219
*Brennan <i>v.</i> H. M. Advo- cate, 1954	103	Inland Revenue Commis- sioners <i>v.</i> Baddeley, 1955	227
*Cameron <i>v.</i> Hamilton's Auction Marts, Ltd., 1955	299	*Ironside <i>v.</i> Ironside, 1955	304
Carmarthenshire County Council <i>v.</i> Lewis, 1955 .	223	Joshua, Ebenezer Theodore <i>v.</i> The Queen, 1955 . . .	119
*Connelly <i>v.</i> H. M. Advo- cate, 1954	106	*Lang <i>v.</i> Lang, 1954 . . .	112
*Coogans <i>v.</i> Macdonald, 1954	106	*Law Society of Scotland, 1955	105
*Cryans <i>v.</i> Nixon, 1954 . .	103	*M'Farlane <i>v.</i> M'Farlane, 1951	104
Davis Contractors, Ltd. <i>v.</i> Fareham Urban District Council, 1955	306	*Mackinnon <i>v.</i> Iberia Ship- ping Co., 1955	213
		M, <i>Re</i> , 1955	305
		Martin-Baker Aircraft, Ltd. <i>v.</i> Canadian Flight Equip- ment, Ltd., 1955	307
		*Matuszczyk <i>v.</i> National Coal Board, 1955 . . .	215
		Morgan, <i>Re</i> , 1955	227

	PAGE		PAGE
Nisbet Shipping Co., Ltd. v.		Strongman (1945) Ltd. v.	
The Queen, 1955 . . .	310	Sincock, 1955 . . .	308
*Plank v. Magistrates of		Takim & Co. v. Fazal	
Stirling, 1955 . . .	302	Kassam Velji, 1955 . .	231
Regina v. Rowe, 1955 . . .	225	Vincenti, Gustavo Romeo v.	
*Ross's Judicial Factor v.		Stephen J. Borg, 1955 .	315
Martin, 1955 . . .	220	Wimpey & Co., Ltd. v.	
Said Ajami v. Comptroller		British Overseas Airways	
of Customs, 1954 . . .	115	Corporation, 1954 . .	226
Shave v. J. W. Lees		Wright, Blizard v. Lock-	
(Brewers) Ltd., 1954 . .	109	hart, 1954, <i>Re</i> . . .	108

SUBJECTS OF CASES COMMENTED ON

Scots Cases are indicated by an asterisk

	PAGE		PAGE
Admission of Expert Evidence	115	Contract — Commercial agreement—No provision for determination—Whether presumption of permanence	307
Adoption — Consent of parent—Whether consent of father of illegitimate child necessary to adoption order—Adoption Act, 1950	305	Contract—Delay in completion—Quantum meruit	306
*Arms—Precedence of legal societies	105	Contract—Pacta illicita—Collateral warranty	308
Assessment of Damages—Insurance benefits—Law Reform (Personal Injuries) Act, 1948, s. 2 (1)	309	Contract — Third party's claim to exemption under contract—Jus quaesitum tertio	110
*Central Land Board — Whether Crown department — Disclosure of documents—Privilege	217	Contracts Contrary to Public Policy — Separation agreement between husband and wife—Maintenance instalments requiring to be paid to enemy territory	224
Charge of Effecting a "Public Mischief"	119	Contribution between joint tortfeasors — Action against one time-barred—Whether contribution still permissible	226
Charitable Bequest—Failure of particular charitable purpose after testator's death — Whether bequest has "taken effect"	108	Copyright—Musical work—Equipment not a "gramophone"	117
Charity—Recreation ground — Gift for a parish—Whether valid charitable gift	227	Crime—Appeal—Death of appellant — Application for leave to appeal by widow	225
*Children's Playground—Child injured—Invitee or licensee—duty of licensor	302	*Crime—Power of High Court to intervene—Sentence	106
Collision — Limitation of liability	310	*Crime — "Recent possession"—Extent of possession requisite	103
*Contempt of Court—Jurisdiction—forum for appeal	298		

	PAGE		PAGE
*Crime— <i>Whether disqualification from driving a "penalty"</i>	106	*International Law— <i>Locus delicti—Solatium</i>	213
Damages — <i>Personal injuries—Excessive or inadequate awards by judge or jury—Power of Appellate Court to review</i>	109	Local Contract Note — <i>Exemption from stamp duty</i>	231
Divorce — <i>Constructive desertion — "Intention" and "desire"</i>	112	Negligence— <i>Child on highway causing accident—Whether education authorities liable to widow of driver who was killed</i>	223
*Divorce — <i>Cruelty—How "protection" given</i>	104	*Negligence — <i>Remoteness of damage—Whether Re Polemis represents Scots law—Cow in china shop</i>	299
*Divorce— <i>Insanity — interruption of period of care and treatment</i>	304	Police Constable— <i>Crown's claim for loss of services</i>	228
*Doctor— <i>Professional negligence—Standard of care</i>	220	*Res Judicata — <i>Common law fault and statutory duty</i>	215
Employees as Beneficiaries — <i>Invalid charitable bequest</i>	234	*Solatium — <i>Challenge of awards—Comparison of aggregate awards</i>	214
*Hospital's liability— <i>Nurse attending operation</i>	303	*Succession — <i>Common calamity</i>	220
Immovable Property— <i>Right of pre-emption</i>	315	"Weight of Evidence"— <i>Inaccurate phrase</i>	313
		*Will— <i>Notarial execution</i>	219

London Nov 2
to Publ. 4 10
and

The Juridical Review

Vol. LXVII, No. 1

April 1955

CONTENTS

	PAGE
The Anatomy and Pathology of the Constitution	1
J. D. B. MITCHELL, LL.B., PH.D., Professor of Constitutional Law in the University of Edinburgh.	
Stair the Scientist	23
THE RT. HON. LORD COOPER OF CULROSS, O.B.E., LL.D., DOCTEUR H.C. (Univ. de Paris).	
The Universities and Scottish Legal Education	26
ALISTAIR R. BROWNLIE, M.A., LL.B., Solicitor.	
Parliamentary Supremacy and the Language of Constitutional Limitation	62
GEOFFREY MARSHALL, M.A., Department of Political Science, University of Glasgow.	
Some Aspects of the Social and Ethical Element in Analytical Jurisprudence	79
A. G. CHLOROS, B.A. (Oxon.), Lecturer in Law in the University College of Wales, Aberystwyth.	
Recent Leading Scottish Cases	103
DAVID M. WALKER, M.A., LL.B., PH.D., Advocate, Professor of Jurisprudence in the University of Glasgow.	
Recent Leading English Cases	108
W. A. ELLIOTT, M.C., B.L., Advocate, and of the Inner Temple, Barrister-at-Law.	
Recent Privy Council Cases	112
Current Periodical Literature	121
K. W. B. MIDDLETON, B.A., LL.B., Advocate, Sheriff-Substitute of The Lothians and Peebles at Edinburgh.	
Recent Literature: Legal, Historical, General	125

Edinburgh

W. GREEN AND SON, LIMITED

Law Publishers

AGENTS IN AMERICA—THE CARSWELL CO., LTD., TORONTO

JUST PUBLISHED

The Law of Damages in Scotland

By

DAVID M. WALKER, M.A., LL.B., Ph.D.

Advocate, Professor of Jurisprudence in the University of Glasgow

lxxii and 843 pages

Price £6 6s. post free

‘This is a pre-eminently practical work. . . . It will be one of the big books of our law and will take its place alongside the works of such as Gloag and Rankin.’

—Professor A. D. Gibb in the *SCOTS LAW TIMES*

The Scottish Bankruptcy Manual

FIFTH EDITION

By

JOHN B. WARDHAUGH, C.A.

WITH SEPARATE SEQUESTRATION TIME CHART

xx and 293 pages

Price 35s.

W. GREEN & SON

The Western Political Quarterly

A National Professional Journal published in March, June, September, December by the University of Utah

INDOCHINA'S DESTINY	Shen-Yu Dai
COLD WAR TRAGEDY	James P. Warburg
ORGANIZING FOR PEACE IN ASIA	Norman D. Palmer
U.S. POLICIES IN NORTH AFRICA	Lorna H. Hahn
COMMUNIST STRENGTH IN FRANCE	Charles A. Micaud
INTERNATIONAL ORGANIZATION	Quincy Wright
INSTABILITY IN LATIN AMERICA	Harry Kantor

and other feature articles offered by the

WESTERN POLITICAL QUARTERLY

Approximately 900 pages. Four dollars per volume. (\$5.00 abroad)

Send orders to the Editor, Professor F. B. Schick
University of Utah : Salt Lake City, Utah, U.S.A.

The Medico-Legal Journal

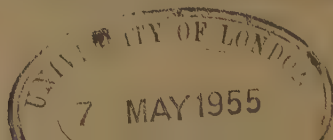
(formerly The Medico-Legal and Criminological Review)

This quarterly is the organ of the Medico-Legal Society (*Hon. Sec.* : Meadows Martineau, B.A., 40 Carey Street, Lincoln's Inn, W.C.2) and reprints the papers read to the Society at its meetings and a report of the ensuing discussions. In addition it contains special articles and abstracts dealing with matters of medico-legal interest by acknowledged experts.

The annual subscription is £1 1s. post free, but is included in the annual subscription of the Society which is £2 2s.

Published for the Society by Heffers, Petty Cury, Cambridge

Printed in Great Britain by The Eastern Press, Ltd., London and Reading.



B 13 JUL 1956

1957

10182.11

